TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. ~~112~~ 18.

LEWIS MILLER, PLAINTIFF IN ERROR,

vs.

THE CORNWALL RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED JUNE 5, 1896.

(15,601.)

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 6, 1896.

a To the Honorable George Shiras, Jr., justice of the Supreme Court of the United States:

The petition of Lewis Miller respectfully showeth that your petitioner is a resident of Lebanon county, State of Pennsylvania, and on March 24th, 1891, brought a suit in the court of common pleas of Lebanon county to No. 56, June term, 1891, against the Cornwall Railroad Company, a corporation of the State of Pennsylvania, in trespass to recover damages for personal injuries sustained through the negligence of the said Cornwall Railroad Company while (as he claims) a passenger on one of their trains.

The facts in the case were these, viz: Messrs. Coleman & Brock Bros. are the proprietors of the Lebanon furnaces, on the outskirts of Lebanon. Five miles distant are the Cornwall ore hills. These two points are connected by the Cornwall Railroad Company. Messrs. Coleman and Brock Bros. received large quantities of ore from the ore hills over the Cornwall railroad, and for this purpose they had their own private cars, which were carried between their furnaces and Cornwall by the defendant company.

The contract between Messrs. Coleman and Brock Bros. and the Cornwall Railroad Company was as follows: Messrs. Coleman and Brock Bros. were to deliver their cars at the yard of the railroad company at Lebanon, and the railroad company would take charge of and haul them out to Cornwall. Here Messrs. Coleman and Brock Bros. would take charge of them again, have them taken by another company to the ore banks, loaded with ore, and re-
b turned to Cornwall. From here the cars would be carried to Lebanon furnaces by the defendant company. Lewis Miller, the plaintiff in the case, was the servant of Messrs. Coleman and Brock Bros. to run the cars from their furnaces to the railroad company's yard, deliver them to the conductor of the defendant company to haul to Cornwall, take charge of them again when delivered at Cornwall, see that they were loaded with ore and delivered again at Cornwall to the defendant company to haul to Lebanon furnaces.

The contract further provided that the charge for freight against Messrs. Coleman and Brock Bros. should include the right of themselves or their servant when engaged in this work to pass to and fro between Cornwall and Lebanon on any train most convenient, whether freight or passenger.

While the plaintiff under this contract was riding on defendants' train between Lebanon and Cornwall the cars were derailed at a frog in a sharp curve of the road, the train wrecked, and the plaintiff injured. The negligence alleged by the plaintiff as the cause of the accident was the unsafe condition of the track at this point and the too fast running of the train by the engineer.

That said suit was tried by a jury, who on March 9th, 1892, rendered a verdict in favor of the plaintiff for $900, subject to the question reserved by the court whether there was "any evidence of defendants' negligence to go to the jury."

That at the trial of the case the fundamental question was whether

(as contended by the plaintiff) his case was that of a passenger seeking to recover against his carrier or that of an employee
c seeking to recover against his employer, and the determination of the question depended upon whether the first section of the act of the General Assembly of the State of Pennsylvania approved April 4, 1868 (P. L., 58), was unconstitutional and avoided by the 1st section of the XIV amendment to the Constitution of the United States.

The 1st section of the act of April 4, 1868, reads as follows, viz:

"SEC. 1. When any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company, shall be only such as would exist if such person were an employee: Provided, that this section shall not apply to passengers."

Under the laws of the State of Pennsylvania as they are now and were at the time of the passage of the act, all that a passenger injured through some defect in the road-bed or in the means of transportation need prove is that he was injured while riding on the train, and the law presumes that the carrier was negligent, and it then becomes the duty of the carrier to show that he was not negligent, and that the injury was caused by some cause for which he was not responsible, while in a suit by an employee the rule is different, and it is necessary for the employee to affirmatively prove that the employer was negligent and failed in his duty.

Before the court and jury the plaintiff contended that the 1st section of the act of April 4, 1868, was unconstitutional, alleg-
d ing, amongst other reasons, that it was avoided by section 1st of the XIV amendment to the Constitution of the United States and could not be considered in the trial of the case, and that therefore the plaintiff when injured was a passenger on defendants' train. The defendants affirmed the constitutionality of the act, and contended that the plaintiff should be treated as an employee of the defendants and a fellow-servant of the train hands running the train on which he was when injured, and that if the accident was caused by the excessive fast running of the train the negligence was that of the engineer running the same, a fellow-employee, for which plaintiff could not recover.

The plaintiff also asked the court to charge the jury *inter alia* as follows, viz:

"1st. Lewis Miller, the plaintiff, was a passenger on the train when he received his injury."

"2nd. The act of April 4, 1868, is unconstitutional and void."

"4th. If the jury believe that the train ran off the track because of the too fast driving over the frog in the curve of the road, then the defendants' negligence is made out, and the plaintiff is entitled to recover unless he by some act contributed to his own injury."

These points were all refused by the court, who in their charge

left the question of defendants' negligence and the question of plaintiff's contributory negligence to the jury, with instructions that they were to treat the plaintiff as if he were an employee of the Cornwall Railroad Company, and that his right of recovery
e was only that of an employee, and that if they found that the train ran off the tracks because of the too fast running of the same the plaintiff could not recover, because the engineer, whose negligence in that case caused the accident, was his fellow-servant.

That under the laws of the State of Pennsylvania, if the first section of the act of April 4, 1868, is unconstitutional, the right of action and recovery of the plaintiff was that of a passenger and not such only as would exist if he had been an employee of the defendants, and that the laws of the State of Pennsylvania applicable to the case of the plaintiff as a passenger injured through the negligence of the defendants, a carrying railroad company, would have required the court at the trial to submit the question of defendants' negligence and plaintiff's contributory negligence to the jury without the reserved question whether there was "any evidence of defendants' negligence to go to the jury," and would have required the court, as a matter of law, to declare that the engineer of the defendants, running the train on which the plaintiff was riding when injured, was the servant of the defendants and his negligence their negligence and not the fellow-servant of the plaintiff, and would have required the court to submit the question of the engineer's negligence in running the train too fast, and thereby contributing to the accident, to the jury instead of withdrawing it from them and imputing it to a fellow-servant, and would have required the court to enter judgment upon the verdict of the jury in favor of the plaintiff.

That the said court of common pleas of Lebanon county directed judgment to be entered in favor of the defendants, The Cornwall Railroad Company, notwithstanding the verdict of *of* the
f jury in favor of the plaintiff.

That the said Lewis Miller, by an appeal, took the said cause to the supreme court of Pennsylvania, to No. 275, January term, 1893, eastern district; which court, after full argument involving a thorough discussion of the questions arising under the 1st section of the XIV amendment to the Constitution of the United States and set forth in the points submitted by your petitioner for the answer of the court as aforesaid (which points formed part of the record of the supreme court of Pennsylvania as well as of the court of common pleas of Lebanon county), affirmed the judgment against your petitioner and in favor of The Cornwall Railroad Company, defendant.

That on January 8th, 1894, your petitioner moved the supreme court of Pennsylvania for a reargument of the cause, alleging again, *inter alia*, the reason that the first section of the act of April 4, 1868, was unconstitutional and avoided by the 1st section of the XIV amendment to the Constitution of the United States; which reargu-

ment asked for was, by the supreme court of Pennsylvania, on February 7th, 1894, refused.

That the supreme court of Pennsylvania, in which said cause was heard and decided, is the highest court of record and the court of last resort in the Commonwealth of Pennsylvania.

That the judgment of said court is final.

That the judgment of the said court, as already shown, necessarily involved the decision of Federal questions, and that said decision is in favor of the State law and against the right, privilege, and immunity claimed by your petitioner under the Constitution of the United States.

g Wherefore your petitioner (herewith presenting a bond with security for approval) prays that a writ of error may be allowed to issue to the said Supreme Court of the United States for correction in that which violates the Constitution and laws thereof, and that the citation to the defendant may accompany the same; and he will ever pray, &c.

LUDWIG MILLER.

STATE OF PENNSYLVANIA, }
County of Lebanon, } *ss:*

Lewis Miller, being duly sworn according to law, deposes and says that the facts set forth in the above petition are true to the best of his knowledge and belief.

LUDWIG MILLER.

Sworn an- subscribed before me this seventh day of May, A. D. 1894.

[Seal Court of Common Pleas, Lebanon County, Pa.]

B. F. HEAN, *Proth'y.*

h [Endorsed:] Lewis Miller *vs.* The Cornwall Railroad Company. Petition of Lewis Miller, pl'ff, for a writ of error, &c.

i UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Lewis Miller, plaintiff, and The Cornwall Railroad Company, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant

to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the ninth day of May, in the year of our Lord one thousand eight hundred and ninety-four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

To the Cornwall Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Pennsylvania, wherein Lewis Miller is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this ninth day of May, in the year of our Lord one thousand eight hundred and ninety-four.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

l STATE OF PENNSYLVANIA, } *ss:*
County of Pennsylvania, }

On this eleventh day of May, in the year of our Lord one thousand eight hundred and ninety-four, personally appeared B. Morris Strouse before me, the subscriber, prothonotary of the court of common pleas in and for said county, resident at Lebanon, Pa., and makes oath that he delivered a true copy of the within citation to Howard C. Shirk, Esquire, counsel for the Cornwall Railroad Company, upon the eleventh day of May, A. D. 1894.

B. MORRIS STROUSE.

Sworn to and subscribed the eleventh day of May, A. D. 1894.

B. F. HEAN, *Proth'y.*

m Supreme Court of the United States.

LEWIS MILLER, Plaintiff in Error, }
vs. } No. —.
THE CORNWALL RAILROAD CO., Defendant in Error. }

In error to the supreme court of Pennsylvania, eastern district, January Term, 1893. No. 275.

Know all men by these presents that we, Lewis Miller and E. M. Boltz, of North Lebanon township, Lebanon county, and State of Pennsylvania, are held and firmly bound unto the Cornwall Railroad Company in the sum of three hundred ($300) dollars, lawful money of the United States of America, to be paid to the said Cornwall Railroad Company, its certain attorney or assigns; to which payment, well and truly to be made, we do bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the twenty-seventh day of February, A. D. one thousand eight hundred ninety-four.

n Whereas lately, in a court of common pleas in and for the county of Lebanon, judgment was entered against the said Lewis Miller at the suit of him, the said Lewis Miller, against The Cornwall Railroad Company, of June term, 1891, No. 56, which judgment was afterwards affirmed by the supreme court of Pennsylvania in a certain plea and suit in said court of January term, 1893, No. 275, in the eastern district of said court, and the said Lewis Miller has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment in the above-entitled suit by the Supreme Court of the United States:

Now, the condition of this obligation is such that if the above-named Lewis Miller, plaintiff in error, shall prosecute his writ of error with effect and answer all costs and damages if he shall fail

to make good his plea, then this obligation is to be void; otherwise to remain in full force and virtue.

LUDWIG MILLER. [SEAL.]
E. M. BOLTZ. [SEAL.]

Signed, sealed, and delivered in presence of—
ELMER E. HAUER.
J. W. EUSTON.

o DISTRICT OF COLUMBIA, } ss:
City of Washington, }

Personally came before me, a notary public in and for the District aforesaid, A. Frank Seltzer, a resident of Lebanon, Lebanon county and State of Pennsylvania, who, being duly sworn according to law, deposes and says that E. M. Boltz, the surety in the above bond, has real estate, over and above all encumbrances and the exemption laws to which he is entitled, to the value of at least fifteen thousand dollars, and further saith not.

A. FRANK SELTZER.

Subscribed and sworn to before me this 9th day of May, A. D. 1894.

[Seal of James D. Maher, Notary Public, District of Columbia.]

JAMES D. MAHER,
Notary Public.

Approved:

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

I hereby certify that the above is a true and correct copy of the bond filed in the above-entitled case.

In testimony whereof I have hereunto set my hand and the seal of said court, at Philadelphia, this 29th day of May, A. D. 1894.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

p In the Supreme Court of Pennsylvania in and for the Eastern District.

Among the records and proceedings of the supreme court of Pennsylvania in and for the eastern district, *inter alia*, the following may be found:

1 *Docket Entries.*

(Supreme Court of Pennsylvania, Eastern District.)

January Term, 1893. 275.

A. Frank Seltzer. B. Morris Strouse. 275.	Lewis Miller, plaintiff, *vs.* Cornwall Railroad Company, defendant.	Appeal of pl'ff from the court of common pleas of the county of Lebanon filed January 17, 1893.
	May 17, 1894, writ of error to the Supreme Court of the United States, allowed by Hon. George Shiras, Jr., associate justice, brought into office.	*Eo die*, certiorari exit, ret'ble the second Monday of February, 1893.
	May 17, 1894, recognizance filed.	February 13, 1893, record returned and filed.
	Eodie, copy of writ of error filed.	*Eodie*, assignments of error filed.
	May 29, 1894, certified copy of record, with original petition, original writ of error, original citation, with proof of service, and copy of recognizance, exit to A. Frank Seltzer, Esq.	February 15, 1893, argued.
		February 27, 1893, judgment affirmed *per curiam*.
		March 1, 1893, remittitur exit and, with record, sent to Howard C. Shirk, Esq.
		January 8, 1894, motion and reasons for reargument filed.
		A. Frank Seltzer, Esq. B. Morris Strouse, Esq.
		February 5, 1894, reargument refused *per curiam*.

2 I hereby certify that the above and foregoing is a true and correct copy of the docket entries in the above-entitled case, so full and entire as appears of record in our said supreme court.

In testimony whereof I have hereunto set my hand and seal of said court, at Philadelphia, this 29th day of May, A. D. 1894.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

Appeal & Affidavit.

In the Supreme Court of Pennsylvania for the Eastern District.

LEWIS MILLER, Plaintiff,
vs.
CORNWALL RAILROAD COMPANY, Defendant.
} Court of Common Pleas of the County of Lebanon, June Term, 1891. No. 56.

Enter appeal on behalf of Lewis Miller, plaintiff, from the judgment of the court of common pleas of the county of Lebanon in above case.

A. FRANK SELTZER AND
B. MORRIS STROUSE,
Attorney- for Appellant.

January 16th, 1893.

To Charles S. Greene, Esq., proth'y sup. ct., E. D.

CITY AND COUNTY OF LEBANON, *ss:*

Lewis Miller, being duly sworn, saith that the above ap-
3 peal is not intended for delay.

LEWIS MILLER.

Sworn and subscribed this 16th day January, A. D. 1893.

B. F. HEAN, *Proth'y.*

Endorsement: "275. January term, 1893. Lewis Miller, appellant, *vs.* Cornwall R. R. Co. Appeal & affidavit. Filed Jan'y 17, 1893. In the supreme court. A. Frank Seltzer, B. Morris Strouse."

Præcipe for Certiorari.

In the Supreme Court of Pennsylvania for the Eastern District.

LEWIS MILLER, Appellant.

Certiorari to the court of common pleas of the county of Lebanon, of June term, 1891. No. 56.

Issue certiorari to the court of common pleas of the county of Lebanon to bring up record and proceedings in a certain action in said court, No. 56, June term, 1891, wherein said appellant was plaintiff and Cornwall R. R. Co. was defendant, returnable to next term, *sec. reg.*

A. FRANK SELTZER.
B. MORRIS STROUSE.

To Charles S. Greene, proth'y sup. ct., E. D.

4 Endorsement: "No. 275. January term, 1893. Supreme court of Pennsylvania, eastern district. Lewis Miller, appellant, *vs.* Cornwall R. R. Co. Præcipe for certiorari. Filed Jan. 17, 1893. In supreme court. A. Frank Seltzer, B. Morris Strouse."

5 *Record.*

LEWIS MILLER
vs.
CORNWALL RAILROAD COMPANY. } Summons in an Action of Trespass.

Abstract of Proceedings and Docket Entries.

Returnable to the 13th day of April, 1891.

March 24, 1891. Præcipe filed. Issued March 24, 1891.
March 25, 1891. Service of writ accepted by Howard C. Shirk, Esq., attorney for defendant, as per endorsement on writ.
August 26, 1891. Plaintiff's statement of demand filed.
August 26, 1891. Rule at the instance of the plaintiff on the defendant to plead on thirty days' notice or judgment.
September 23, 1891. Defendant by its attorney pleads "not guilty." "Repl. issue."

Trial List, December Term, 1891.

December 7, 1891. Continued by consent.
January 13, 1892. Motion to amend plaintiff's statement filed.
January 13, 1892. Amendment allowed.

BY THE COURT.

Trial List, March Term, 1892.

And now, to wit, March 8, 1892, a jury being called, &c., came Jacob Groh, Adam Rhein, Martin Wengert, William Sattazahn, Cornelius Black, Gideon Boyer, Joseph Gingrich, Franklin Long, John S. Risser, John Lineaweaver, Isaac Rabold and Samuel Darcas, twelve good and lawful men, &c., all of whom being duly affirmed do say, March 9th, 1892, that they find a verdict in favor of plaintiff for $900. (See verdict filed.)

March 12, 1892. Defendant's motion for a new trial filed.
March 12, 1892. Motion permitted to go down on argument list.

BY THE COURT.

March 18, 1892. Plaintiff's points filed.
March 18, 1892. Answers to plaintiff's points filed.
March 18, 1892. Defendant's points filed.

6

March 18, 1892. Answers to defendants's points filed.
April 8, 1892. Plaintiff's bill of costs, to wit, $41.84, filed.
July 20, 1892. Opinion of court filed.

A new trial is refused but judgment is directed for the defendant on the reserved point notwithstanding the verdict. "Exception to plaintiff."

BY THE COURT.

July 25, 1892. Jury fee paid by Howard C. Shirk, Esq., attorney for defendant, (see Cost Book, page 29;) and judgment is hereby entered in favor of the defendant and against the plaintiff on the reserved point, notwithstanding the verdict (as per order of court).

B. F. HEAN,
Prothonotary.

July 25, 1892. Defendant's bill of costs at March term, 1892, filed.
January 16, 1893. Appeal to supreme court of Pennsylvania filed.
January 18, 1893. Writ of certiorari from the supreme court of Pennsylvania received and filed. Plaintiff appeals.

7 *Appeal to the Supreme Court.*

LEWIS MILLER
v.
THE CORNWALL R. R. Co.
} In the Court of Common Pleas of Lebanon County, of June Term, 1891. No. 56.

And now, January 16, 1893, the plaintiff appeals from the judgment entered by this court against him on July 25, 1892, to the supreme court.

LEWIS MILLER.

Lewis Miller, the plaintiff in the above case, having been duly sworn according to law, doth depose and say that the above appeal is not intended for delay.

LEWIS MILLER.

Sworn to and subscribed to before me this 16th day of January, 1893.

B. F. HEAN, *Proth'y.*

Endorsement: No. 56. June term, 1891. Lewis Miller *v.* The Cornwall Railroad Company. Appeal to the supreme court. Filed Jan'y 16, '93. A. Frank Seltzer, B. Morris Strouse, attorneys for plaintiff.

8 *Defendant's Bill of Costs at March Term*, 1892.

LEWIS MILLER
v.
THE CORNWALL RAILROAD COMPANY.
} No. 56. June Term, 1891.

Def't's bill of costs at March term, 1892.

1 subpœna	....	25
Serving same & mileage	....	4 86
Aaron Sattegoher		
Augustus Dewalt, 2 days	2 00	
Mileage	06	
		2 06
Mahlon Smith, 2 days	2 00	
Mileage	06	
		2 06
Henry Shunk, 2 days	2 00	
Mileage, 8 miles cir	24	
		2 24
Daniel McCarty, 2 days	2 00	
Mileage	06	
		2 06
Geo. McCornell, 2 days	2 00	
Mileage	06	
		2 06

Ben. Craig, 2 days	2 00		
Mileage	06		
			2 06
Elmer Bluntz, 2 days	2 00		
Mileage	06		
			2 06
9 Al. Graham, 2 days	2 00		
Mileage	06		
			2 06
C. S. Havard, 2 days	2 00		
Mileage	06		
			2 06
John MacDonald, 2 days	2 00		
Mileage	06		
			2 06
W. G. Christian, 2 days	2 00		
Mileage	06		
			2 06
N. P. Moyer, 2 days	2 00		
Mileage	06		
			2 06
Geo. A. French, 2 days	2 00		
Mileage	06		
			2 06
S. M. Huston, 2 days	2 00		
Mileage	06		
			2 06
Ben. Schools, 2 days	2 00		
Mileage	06		
			2 06
Wm. Allwein, 2 days	2 00		
Mileage	06		
			2 06
Henry E. Cox, 2 days	2 00		
Mileage	06		
			2 06
E. E. Shartel, 1 day	1 00		
Mileage	06		
			1 06
Henry Zoller, 2 days	2 00		
Mileage	06		
			2 06
			43 43

Endorsement: No. 56. June term, 1891. Lewis Miller *v.* The Cornwall R. R. Co. Def't's bill of costs at March T., 1892. Filed July 25th, 1892. Shirk, for def't.

10 *Court Subpœna.*

THE COMMONWEALTH OF PENNSYLVANIA, } ss:
Lebanon County, }

In the Court of Common Pleas of said County. No. 56, June Term, 1891.

To Daniel McCarty, George McConnell, Elmer Bluntz, Albert Amber, Harry Cox, Harry Deitrick, Frank Behney, Michael Haggerty, Michael Dolan, James McConnel, Arthur Broek, Wm. C. Freeman, president, and David Hammond, sec., and Charles S. Harvard, train-dispatcher, of the Cornwall Railroad Company, and that you bring with you the rules of the company in force in October, 1890, and the orders made during the month of October, 1890:

We command you and each of you that, setting aside all other business and excuses, you be and appear, in your proper person, at the court-house, in the city of Lebanon, in the county of Lebanon, before the judges of the court of common pleas of said county, on the 7th day of March, A. D. 1891, at 10 o'clock in the forenoon of that day, to testify the truth to your knowledge in the action pending in our said court, undetermined, between Lewis Miller, plaintiff, and Cornwall Railroad Co., defendant, on the part of the said plaintiff; and hereof you are not to fail under the penalty of one hundred pounds.

Charles Newmaster.
Frank Shirk.
Mahlon Smith.
John Shirk.

Witness the Hon. Jno. W. Simmonton, president of the [L. S.] said court, at Lebanon, the 20th day of Feb'y, in the year of our Lord one thousand eight hundred and ninety-two.

B. F. HEAN,
Prothonotary.

Endorsement: Lewis Miller *v.* Cornwall R. R. Co. Court subpœna. Constable Sohns.

Costs for subpœna & mileage	$5 07
Additional	27
	5 34

11 *Court Subpœna.*

COMMONWEALTH OF PENNSYLVANIA, } ss:
Lebanon County, }

In the Court of Common Pleas of said County. No. 56, June Term, 1891.

Court Subpœna.

To —— ——:

We command you and each of you that, setting aside all other business and excuses, you be and appear, in your proper person, at

the court-house, in the city of Lebanon, in the county of Lebanon, before the judges of the court of common pleas of said county, on the 8th day of December, A. D. 1891, at 9 o'clock in the forenoon of that day, to testify the truth to your knowledge in the action pending in our said court, undetermined, between Lewis Miller, plaintiff, and Cornwall Railroad Company, defendant, on the part of the said —; and hereof you are not to fail under the penalty of one hundred pounds.

Witness the Hon. John W. Simmonton, president of the [L. S.] said court, at Lebanon, the 24th day of November, in the year of our Lord one thousand eight hundred and ninety-one.

WM. GERBERICH,
Prothonotary,
Per W. H. HOSTETTER, *Dep'ty.*

Endorsement: No. 56, June term, 1891. Lewis Miller *vs.* Cornwall Railroad Company. Court subpœna.

12 *Plaintiff's Bill of Costs.*

LEWIS MILLER
v.
THE CORNWALL R. R. Co. } In the Court of Common Pleas of Lebanon County, of June Term, 1891. No. 56.

Plaintiff's bill of costs.

2 subpœnas		50
Constable John Sohn, subpœnaing witnesses & mileage		5 34
Daniel McCarty,	2 days & mileage	2 06
George McConneall,	" "	3 20
Elmer Bluntz,	" "	2 06
Albert Gruber,	" "	2 06
Harry Cox,	" "	2 06
Harry Deitrich,	" "	2 06
Frank Behney,	" "	2 06
Michael Haggerty,	" "	2 06
Michael Dolan,	" "	2 06
James O'Connell,	" "	2 06
Harry Euston,	" "	2 06
Charles Havard,	" "	2 06
David Hammond,	" "	2 06
Charles Newmaster,	" "	2 06
Frank Shirk,	" "	2 06
Mahlon Smith,	" "	2 06
John Shirk,	" "	2 06
Total		$41 84

FRANK SELTZER AND
B. MORRIS STROUSE,
Att'ys for Plaintiff.

13 Endorsement: No. 56. June term, 1891. Lewis Miller *vs.* The Cornwall R. R. Co. Plaintiff's bill of costs. Filed April 8, 1892. A. Frank Seltzer and B. Morris Strouse, att'ys for plaintiff.

14 *Motion for a New Trial and Reasons.*

LEWIS MILLER
v.
THE CORNWALL RAILROAD COMPANY.
} In the Supreme Court of Common Pleas of Lebanon County, June Term, 1891. No. 56.

And now, March 12, 1892, the defendant, by its attorney, Howard C. Shirk, moves the court for a new trial, and in support of said motion filed the following reasons:

1. The learned court erred in admitting any testimony in behalf of the plaintiff regarding the condition of the ties and guard-rail at or near the point of the accident.
2. The learned court erred in admitting any testimony on behalf of the plaintiff regarding the condition of the defendant's line of railroad, except so far as it relates to the frog referred to in the plaintiff's statement of demand.
3. The learned court erred in not striking out all testimony on behalf of the plaintiff regarding the condition of the defendant's roadway, except so far as it related to the said frog.
4. The verdict was against the law.
5. The verdict was against the evidence.
7. The verdict was against the charge of the court.

HOWARD C. SHIRK,
Att'y for Def't.

15 Endorsement: January 12, '92. Motion permitted to go on arg. J. B. McP. 56. June term, 1891. Lewis Miller *v.* The Cornwall Railroad Company. Motion for a new trial and reasons. Filed March 12, 1892. Howard C. Shirk, att'y for def't.

16 Court of Common Pleas, Lebanon County, Pa., Regular March Term, 1892.

LEBANON, PA., TUESDAY A. M., *March 8th*, 1892.

LEWIS MILLER
vs.
THE CORNWALL RAILROAD COMPANY.
} No. 56. June Term, 1891.

Tried before Judge McPherson, Associate Judges Reinoehl and Light, and a jury.

Trespass. "Not guilty."

Appearances: Plaintiff, Col. A. Frank Seltzer, B. M. Strouse, Esq.; defendant, Howard C. Shirk, Esq.

Jury called, impaneled, and all were affirmed.

Case opened to the jury by Mr. Strouse on behalf of the plaintiff.

LEWIS MILLER, the plaintiff, called on his own behalf, having been first duly sworn, testifies as follows:

Direct examination by Col. SELTZER:

Q. Mr. Miller, where do you live?
A. At Lebanon furnaces.
Q. How old are you?
A. I will be fifty this month, the 23d of March.
Q. By whom were you employed on the 16th of October, '90?
A. By Coleman & Brock Brothers.
Q. What were your duties?
A. To take care of the cars, keep them in oil and in repair, and to take them over to the Cornwall road, and hand them over to the conductor, and have them taken out to Cornwall for ore.
Q. After you got them to Cornwall—got the cars to Cornwall, what were your duties there?
A. After they got to Cornwall and uncoupled, the cars was in my charge until moved up to the ore hills; that is a different company, that is the Ore Bank Company.
Q. What were your duties at Cornwall?
A. After they had the cars there, I was free. I was ready to follow the next train into Lebanon.
Q. What occurred to you on the morning of October 16th—was it your business to bring the cars to the Cornwall Company from the ore hill?
A. No, the Cornwall Ore Bank Company fetched them down to the weigh-scale, and there the company weighs them, and they take them down to the siding. I have nothing to do with the cars after they are put in the yard there at Cornwall. I had the privilege of coming in on any train, passenger or freight—any train that I was ready for—I could come back to Lebanon.
Q. What did you do this particular morning when you went out?
A. I went out October 16th; we run out there—
Q. What year?
A. 1890.
Q. Did you bring the cars down?
A. I fetched my train down of course, to the Cornwall road, and had them attached to the train; they took me out in the cars also. When they were out to North Cornwall, they slacked up, and pulled through and set back two passengers again, and they took such awful headway from North Cornwall to Cornwall that I thought it was too fast to run around that curve, as I noticed a jar there, and I had went to the conductor and told him of the jar.

17 Q. When did you tell that to the conductor?
A. That morning, on the 16th of October, going out. I told the conductor on the road, and one of the brakesmen, of this jar. I told him if they run around at this rate, it would happen so and so, and it did.
Q. Describe the location as near as you can where the accident

occurred—what I want to know is, the curve of the road, where it is, and what kind of a curve.

A. The frog lies on the curve; it is a very short curve going around the mill there.

Q. Tell us especially where it is.

A. It is right between the station-house and the store, where the frog is.

Q. Now on that particular morning, where did the cars run off the track?

A. The cars run right off at the frog.

Q. Be good enough to explain to the court and jury why that frog was there.

A. That frog was there to run over, of course, to go into the store siding, to run through from that branch, off into the siding to the store.

Q. How did the cars run off there?

A. The cars run off where the track was intended to——

Q. Which way did they run?

A. Right at the frog towards Cornwall.

Q. Towards Fox's store?

A. Yes.

Q. The curve, as I understand it, went eastward?

A. It went eastward, yes, sir.

Q. And the cars ran off westward—ran off the track westward?

A. Southward, you mean.

Q. Yes, southward—that is to say, westward from a direct line of the road towards Fox's store?

A. That lies north and south.

Q. Exactly, but I just simply want to fix it—where the accident occurred.

A. It ran right off at the main track, the wreck followed the main track.

Q. What I want to get at is, the road curved eastward from a straight line.

A. It beyond the frog curves east—that is, going to the ore hills, but there at the frog the cars ran off the track.

Q. What caused the cars to run off the track, as far as you know?

A. The frog was out of line, and the guard-rail had given way; the frog was not lying in line, and the ties were rotten under it; they were raising the track the same evening, before, close to the frog, putting ties in, the evening before the accident.

Mr. SHIRK: I object to this as not being in accordance with the declaration of the plaintiff.

Discussion by Mr. Shirk, and discussion by Col. Seltzer in reply.

By the COURT: Whatever is necessarily a part of the frog is of course competent.

(Further discussion by Mr. Shirk.)

By the COURT: Only so far as it has a bearing upon the safe use of a frog would it be competent.

Q. Now, Mr. Miller, be kind enough to explain the defect of the frog, of the construction of the frog.

A. The construction of the frog was, that the frog laid too low and was out of line. The frog was placed—I don't thing it was ever in line since that frog was placed there; I noticed before that it struck cars around where I was sitting on, and the cars had jumped on the rail before this occurred, and I had told Mr. Neff about it nine or ten days before.

(Objected to as incompetent so far as what he told Mr. Neff is concerned.)

18 The WITNESS (continuing): I told Mr. Neff about it and he had left me by the idea that he would attend to it, and after that they had worked at the track, but they were not up to the frog yet. The frog was in the same condition until this here accident occurred.

Q. What was the condition of the ties under the frog?

A. Some of the ties was rotten.

Q. Were they depressed or otherwise?

A. You see the frog had been out of line. The frog did not line with the rail. The wheel did not strike the rail as it should have been; so quick as a guard-rail is moved away, more than two inches and a half, a car is not able to run through the frog safe; the proper way is to have that moved away two inches and a quarter, and that is the real gauge that it should be.

Q. How was that, Mr. Miller, at the time you called the attention of Mr. Neff to it?

A. That guard-rail was out of place about two inches.

Q. That is to say, it was about how many inches wide?

A. It was about four inches wide.

Q. You understand something about railroading?

A. Yes, sir.

Q. How long have you been at it?

A. Twenty-four years.

Q. Now, Mr. Miller, did you especially see that this was out of place—the guard-rail, right at the frog there?

A. Yes, sir, after I had reported to Mr. Neff, then I got out, stepped off at the station and walked down to the frog and examined the thing. I looked after the guard-rail after it had struck the cars around the first time.

Q. How long was it before the accident occurred that the cars jumped up there as you have stated?

A. That might have been about nine or ten days before.

Q. Now, when you called Mr. Neff's attention to this, what did Mr Neff say to you in words?

(This testimony objected to.)

By the COURT: What do you propose to prove?

Col. SELTZER: I propose to prove that when Miller told Mr. Neff about this defective frog—what Mr. Neff told him he would do. This to show that Miller had nothing to do in the manner of con-

tributing to the negligence, and that Mr. Neff left him under the impression that he would fix the frog.

Mr. SHIRK: I object to this on the ground that this evidence as stated without the purpose, is incompetent, and it is certainly incompetent to establish any negligence on the part of the defendant. First, that it is generally incompetent, and second, that it is incompetent to establish any negligence on the part of the defendant.

By the COURT: The offer as it stands is incompetent, and the evidence proposed must be rejected.

(Exception by the plaintiff.)

Col. SELTZER: We make this further offer to introduce this testimony to show that he did not take the risk, if the court should hold that he comes under the act of 1868.

By the COURT: In the present state of the proof, the offer is incompetent.

(Exception by the plaintiff.)

Q. Had you anything to do with the running of a train?

A. No, sir.

Q. You went out with a train when you had cars upon it, as I understood you to say before?

A. Yes.

19 Q. How much did you earn at this time?

A. Forty-nine to fifty dollars a month.

Q. How much had you earned before that time?

A. That was what I earned at that time.

Q. Before that, what was the highest you earned?

A. I had so high as $2.25, or I had as high as $60 a month.

Q. What was the average of your earnings about that time?

A. The average of my earnings was around $50 a month.

Q. How long had you worked for Mr. Brock and for the Colemans?

A. Thirty-seven years.

Q. Were you a man of good health, and regular at your work before this accident occurred?

A. Yes, I worked every day, except I was sick and that was not often.

Q. What was your physical condition? Were you a strong, healthy man?

A. Yes, I was a strong, healthy man before this happened.

Q. Be good enough to describe the injury that you received.

A. I have received the injury that I had my leg broken right over the ankle, and that I am not able to do any kind of work except such as watching, what I am at now.

Q. What part of the foot—did you show to the jury where it was broken?

A. Yes, sir.

Q. Just show it, if you please.

(The witness shows the jury where he was injured.)

The WITNESS: Right over here. (Indicating.) It is according

to how the weather is that affects me. You can see it—a crippled leg forever.

Q. How long were you sick that you could not get out of bed; that you were lying there?

A. I was, something over eight months.

Q. Could you do anything at all at that time?

A. No, sir.

Q. What is the bill that you must pay the doctor; how is it about the doctor's bill?

A. One hundred dollars.

Q. To whom?

A. Dr. Guilford.

Q. Have you paid that yet?

A. No, I was not able to pay it.

Q. Had you any other doctor?

A. I had Dr. Gloninger to help to set the leg. The company paid him, and he only had one visit. That was a cheap bill.

Q. I want to call your attention to the fact of this frog, aside of this frog you say there were guard-rails?

A. Recollect, here is the frog, and the guard-rail is on this side, (indicating), the opposite side.

Q. What was the reason—that is spiked down, is it not?

A. Which, the frog?

Q. The guard-rail?

A. The guard-rail is spiked down solid. It has to be good or it won't go through. It must be solid.

Q. What was the reason that the guard-rail had moved? Was the guard-rail moved out of place just before this wreck, that you know of?

A. Yes, sir.

Q. How far—you did already testify to that?

A. I would judge four inches that the guard-rail was away, when it should have been two and a half, or two and a quarter; at the time of the accident it was four inches.

Q. What was the reason that this guard-rail gave way?

A. On account of rotten ties.

Q. Do you mean to say that it ought to be spiked down, and——

(Objected to.)

A. The spikes gave way on account of rotten ties.

20 Mr. SHIRK: Does the exception cover any allegation as to the guard-rail?

The WITNESS: That is the guard of the frog——

Q. You say that the guard-rail had moved, and was about four inches away, and that it should have been only about two inches and a half away?

A. Yes, sir.

Q. And I understand you to say that the guard-rail had to be spiked down, and the ties were defective or rotten, and that was the reason that the guard-rail——

The WITNESS (interrupting): Yes, the wheel of the cars had pushed the guard-rail off.

Q. Then in running, how did that affect the cars running off?

A. After the guard-rail had given way, the cars pushed over towards the frog and run right over the tongue of the frog on the top of the rail mit the flange, then they had to go off, there was nothing to save them.

Q. Did they, as a matter of fact, remove the ties?

A. They removed the ties the next day after the accident—that is, a couple of days after the accident.

Mr. SHIRK: I object to that, he didn't see that; he couldn't know that.

Q. How long were you there at the wreck?

A. I was there about two hours, or two hours and a half; two hours anyhow.

Q. What I wanted to get at especially, Mr. Miller, was, you had already begun your testimony as to the changing their sills a couple of days before, or a day or so before, or the night before; where did they do that?

A. That is partly in front of the frog, this way from the frog they have put in ties.

Q. You saw them?

A. Yes, sir.

Q. That made a sort of elevation, didn't it, the new ties?

A. Yes, of course, they raised the track also, when they went to put in ties, the track is more or less raised.

Q. How far away from the frog was this raising of the ties?

A. I couldn't say the far, not very far, I didn't measure that distance.

Q. How fast were the cars driven around that curve that morning, in your estimation?

(Objected to as incompetent unless he proves some knowledge of the running of trains.)

Q. How fast in your estimation did they run around that curve that morning?

A. Well, from fifteen to sixteen miles an hour.

Q. Was that faster than was usual or safe?

A. Yes, that was the fastest that they went around for a long time.

Q. They didn't get around this time, did they?

A. No, they didn't get around, they got off, that was what helped to fetch it off, a bad frog, and fast running; of course both together would not work.

Cross-examination by Mr. SHIRK:

Q. You say you have been twenty-four years railroading?

A. Yes, sir.

Q. Where were you railroading this twenty-four years?

A. I was railroading some twenty years over the Cornwall road, and awhile on the P. & R.

21 Q. By whom were you employed during these twenty years? You were employed over the Cornwall railroad by whom?

A. By Coleman.

Q. Doing what?

A. Attending to the cars, taking them over to the Cornwall road, and having them sent out to Cornwall for ore. They were running the ore cars.

Q. You were running the ore cars of Coleman & Brock at the furnaces, weren't you?

A. No, the cars run me, after I was on the Cornwall road.

Q. You run the cars off down into the yard?

A. I was there to run them on the Cornwall branch, and they had to take them to the ore hill.

Q. Didn't you carry them right down over the Cornwall railroad?

A. I run them down to whatever the train was that was lying there to receive them. I run them in the yard, whatever train was ready to receive my cars.

Q. You run them down from North Lebanon furnace over the Cornwall railroad, down over the Valley branch into the yard of the Cornwall railroad?

A. Yes, sir, into the yard up to the train.

Q. So they were attached to the regular train and carried to Cornwall, weren't they?

A. Yes, sir, attached to the train there.

Q. Run on to the Anthracite siding, weren't they?

A. That was different, sometimes on that one and sometimes on the other, I couldn't testify to that.

Q. You accompanied the cars, didn't you?

A. The cars more accompanied me, I was sitting on them.

Q. As a matter of fact you sat in the cars and rode from Lebanon to Cornwall, didn't you?

A. Sometimes I rode different——

Q. You were sent really in your own cars?

A. Sometimes I rode on mine and sometimes on somebody else's.

Q. As a rule, you occupied your own cars, didn't you?

A. Most times I did; I preferred my own.

Q. And broke on these cars?

A. I had no need of breaking.

Q. As a matter of fact, didn't you brake on these cars?

A. I had no need to brake.

Question repeated.

A. Sometimes I did.

Q. When the engineer called for brakes, didn't you join with the other brakemen and brake?

A. That was how I felt; I had no need of doing it; I did it sometimes.

Q. When the cars got out of repair, who reported them to the firm, to the North Lebanon Furnace Company?

A. I was the man to repair them when they got out of repair; I put them in repair when I could.

Q. Whenever any accident occurred you were the man to repair them, weren't you?

A. Yes, when any accident occurred on the road to them, sometimes what I could do, I did.

Q. Your duty was to go with your empty cars and see to the loading of the ore, was it not?

A. My duty was to go along with the cars and see that they got to the ore company.

Q. And when anything got out of repair, your duty was to repair it if you could?

A. It might, what I could, but my duty—I did not repair nothing along the line what was broke along the line, I hadn't anything to do with repairing.

22 Q. If anything got out of fix, was it not your duty to put it in fix?

A. When it was a little thing that I could do, I did it. It was not my duty to see along the Cornwall road, I couldn't make no repairs with the hand, I had no tools. I pushed in packing in the boxes, I did that, or put a little oil in sometimes, such repairs I did; that was my duty.

Q. And that duty you performed where you could on the road, and where you couldn't do it there you did it at home?

A. Yes, I done it sometimes along the road.

Q. Mr. Miller, you have testified to noticing that this track was out of repair sometimes before this accident?

A. Yes, sir.

Q. And of making a complaint?

A. Yes, sir.

Q. When was that?

A. It was nine or ten days before this happened.

Q. At that time you say the track—the guard-rail was out of place?

A. The guard-rail was out of place, yes, sir.

Q. What did you say was wrong with the frog at that time?

A. The frog was out of line.

Q. And you made a complaint about it?

A. Yes, sir.

Q. When did you make an inspection of it after that time?

A. I made an inspection several times after.

Q. How long before the accident did you make the last inspection?

A. The accident?

Q. Yes.

A. That was only a few days before.

Q. What day of the week did the accident occur?

A. What day of the week? Haven't I told you it was on the 16th of October?

Q. Was it five, or six, or seven days before the accident that you last looked at this frog to see if it was out of repair?

A. No, the last time—no, it was only a few days.

Q. How many days?

A. That I couldn't tell you just exactly, I don't remember now.

Q. Try to think a little.

A. That is hard to do, that is too long ago already.

Q. Do you know whether it was two days or five days?

A. Yes, I know, but then I didn't—I said it was a few days before, I couldn't tell you now just exactly the day when I did it.

Q. Then the same frog was in and the same defect was there that you say was there nine or ten days before?

A. The frog was out of line the same day that the accident occurred.

Q. I mean the day now that you made the last inspection before the accident?

A. It was out of line the same way that time.

Q. The same frog and the same guard-rail out of fix?

A. I say that the frog was out of line, and the guard-rail was not in its place. I don't know whether they put another frog in or not. That I couldn't tell you. I say that the frog was out of line at the same time that this here occurred; they might have put in another frog in there, but the man probably was not capable to line the frog.

Q. Mr. Miller, immediately after the accident, where were you taken to?

A. Sir?

Question repeated.

A. I was laying in the corner suffering.

Question re-repeated.

A. I was taken over to the store.

Q. That is, south of the frog?

A. Well, I was right forninst of it; the cars had run off down, the cars didn't lay right at the frog; I had to go up and walked up to the depot. They helped me. I had a man on each side of me. I walked on one leg up.

23 Q. You didn't go there and inspect the track at that time?

A. I seen how the thing looked though.

Q. You didn't go there and inspect the track at that time?

A. I seen it, it was before my eyes, I had to go along, I passed it, I couldn't get over it.

Q. How many cars were on the train that morning, and in what order did they come?

A. I couldn't tell you what order, or how many there was, I couldn't tell you how many were loaded. I had—I — between twelve and thirteen. I couldn't tell you that for certain any more.

Q. They were the last cars on the train?

A. Yes, mine was the last cars.

Q. There were three Donaghmore cars, weren't there?

A. That I couldn't tell you.

Q. Immediately in front of the Donaghmore cars there was a large number of coke cars, weren't there?

A. Yes, sir.

Q. They were loaded, weren't they?

A. Yes.

Q. A large number of them, weren't there?

A. Not a very large number, no, sir.

Q. Ahead of the coke cars there was a number of loaded stone cars, weren't there?

A. That I couldn't tell you, I was not interested in that business, this company's affairs. I didn't take notice of it.

Q. In what car were you at the time of the accident?

A. A Donaghmore car.

Q. The one immediately back of the coke cars, was it?

A. Yes, sir.

Q. The coke car which first jumped the track?

A. Yes, sir.

Q. Were you thrown out, or how did you get out?

A. I was thrown out. We had to jump like a balloon, we went flying up in the air, there was no getting out.

Q. The first car that mounted the track was the coke car, and you were immediately behind it in the Donaghmore car?

A. Yes, sir.

Q. How far is North Cornwall from the place of the accident?

A. That I couldn't tell you; it might be about a mile and a half, I should judge.

Q. They come almost to a dead stop there, don't they?

A. Yes, sir.

Q. In order to pass the switch?

A. Yes, to turn the switch.

Q. In order to get up any speed, they must get it up between that point and the place of the accident?

A. Yes.

Q. Do you say that this frog and this guard-rail and the track itself—the guard-rail and the frog were just in the same condition as when you first made complaint to Mr. Neff?

A. That I couldn't tell, whether they were in the same condition as I first reported them. It was out of place, that I can say.

Q. How do you mean that it was out of place, how did you discover that it was out of place?

A. I was sitting on the car, and it had struck when it crossed after I was sitting on here, and the car had worked itself back again and that might have happened the same way that morning as it did on the 16th of October.

Q. Then from your experience as a railroader you formed your opinion of the condition of that frog?

A. Yes, that is a very good point, too, that he can tell you the condition of the frog better than I could when I would get alongside of it.

24 Q. When did you look at the frog?

A. That was right after I had reported to Neff.

Q. How long before the accident?

A. Several days after I reported, the accident was.

Q. How many days?

A. I don't know, perhaps eight or nine days.

Q. That was eight or nine days before?

A. Yes, about that, I don't remember exactly.

Q. Then you say you inspected it right at that place?

A. Yes, I got off at the station there and walked up the track and I took notice of it; I inspected it, I looked to see what was wrong with the thing.

Q. How did you say you found the guard-rail?

A. The guard-rail was out of place, pushed out; the guard-rail was four inches from the rail.

Q. Did you measure it?

A. I didn't need to measure it. I stuck my hand in, I didn't have to measure that.

Q. Who was with you at the time?

A. Nobody.

Q. What time of the day did you go up to make this inspection?

A. That was in the morning train that I went out; I had no cars; I went out in a passenger train; I walked along the track; I had some business to go for there; I had a car standing on the siding that I went to work at, and I took notice that way.

Q. Then you made your complaint, you say?

A. I had made my complaint before that.

Q. Did you make another complaint then?

A. No, then I got a complaint myself, I broke my leg after that.

Q. You say you were confined for eight months?

A. I was confined for eight months and something at home that I couldn't do nothing.

Q. Do you mean that you were confined to the house?

A. I was just that I could higgle around; I did not stay here all the time in the house; that you couldn't expect.

Q. How long were you confined to your bed?

A. About a month.

Q. How long did you receive medical treatment?

A. For about two months.

Q. You have received no treatment since, have you, excepting for the grip?

A. O, yes, I have received treatment for my leg, too.

Q. Who treated you since then for your leg?

A. I had Dr. Guilford there after that.

Q. Since the two months you have had Dr. Guilford there treating your leg?

A. Yes.

Q. You are positive of that, are you?

A. Yes, he had given me stuff, anyhow.

Q. For your leg after that?

A. Yes, for to wash it.

Q. During this time that you were confined to the house you were unable to work, you say?

A. Yes, sir.

Q. Unable to earn anything?

A. I didn't earn anything, no, sir.

Q. You got your benefits regularly every month of $20, didn't you?

A. Out of what?

Q. In the lodge that you belonged to?

A. That don't concern the company.

Q. I just want to know whether you did or not?

A. That has nothing to do with the company.

(Objected to as incompetent.)

Redirect examination by Col. SELTZER:

Q. Do you still suffer pain with your injury?

A. Yes, sir.

Q. How does the wound affect you?

A. The wound affects me when there is any change in the weather so that I can hardly be able to walk around.

Q. What part of a day's work can you do now?

A. Well, I couldn't do one-fourth of a day's work—that is, when they put me at hard labor.

Q. Now, you saw the condition of the track you say because you were there at the accident, eh?

A. Yes, sir.

Q. And you say that the sills and rails were torn up by the accident?

A. Yes.

Q. So that the track was all torn up?

No response.

Q. And all the cars were piled around; they were piled around?

A. They were piled around; they were not all piled around, some were *on* the track.

Q. Mr. Shirk asked you the question whether you pulled the brake sometimes?

A. Yes, sir.

Q. Were you the brakeman on that train?

A. No, sir.

Q. Did anybody pay you for braking?

A. No, sir.

Q. That was a voluntary thing?

A. Yes, voluntary.

Q. You didn't brake that morning, did you?

A. No, sir.

Q. The matter of repairing cars. Did the Brocks hire you to repair their cars, or simply to go out and see that the cars were taken up?

A. I had no repairing to do; my duty was to oil them and keep them in such stuff, it was my duty at home before I started.

Q. You weren't hired by the Brocks to repair cars?
A. No; that takes a mechanic; that takes tools to repair cars.
Q. Do you know of your own knowledge whether the cars that were broken up by the negligence of the Cornwall Company were paid for by the company to the Brocks?

(Objected to.)

By the COURT: That is not competent.
Question withdrawn.

Recross-examination by Mr. SHIRK:

Q. What did I understand you to say about the oiling; you oiled the cars only at the North Lebanon furnace?
A. Yes; I oiled my own cars before I started, then I had a man to assist me; I had a man to help me.
Q. You don't know what contract—that is, I mean you were not present at the making of any arrangement for repairing cars for the North Lebanon furnace, were you?
A. How is that?
Question repeated.
A. With whom did you mean?
Q. With the owners of the North Lebanon furnace.
A. There is no contract with the North Lebanon Company and the Cornwall Company.
Q. How do you know it?
A. Well, I know it.
Q. How do you have your knowledge?
A. Well, I know it, that is——
26 By the COURT: Answer the question.
A. (continued). At least the company says so.
Q. What company?
A. Mr. Coleman, the Coleman Company.
Q. Have you subpœnaed them?
A. Yes, sir.
Col. SELTZER: Do you know that they pay the Cornwall Company freight?
A. Yes, they pay freight, of course.
Q. But so far as you know they have no contract; that is what you want to say?
A. Yes, sir.
Q. Now you know this further fact that the Cornwall Company repairs the cars?

(Objected to as leading.)
By the COURT: Put your question in proper form.
(Question not renewed.)

ELMER BLUNTZ, a witness called for the plaintiff, having first been duly sworn, testified as follows:

Direct examination by Col. SELTZER:

Q. Mr. Bluntz, were you on that wreck on the morning of the 16th of October, 1890?
A. Yes, I was.
Q. Where were you standing?
A. I was standing in a Donaghmore car.
Q. What were you doing, you were standing on a Donaghmore car, what doing?
A. I had my foot up on the side ready to get over in the coal car to cut off.
Q. Were you the brakeman?
A. Yes.
Q. And you say you were standing on a Donaghmore car; who was with you?
A. Lewis Miller and George McConnell.
Q. Who was McConnell and what were his duties?
A. He was conductor.
Q. Be good enough to state where the cars run off the track?
A. As near as I can tell it was about the frog.
Q. Do you know what run off first?
A. That is more than I can say.
Q. Which one did you see go off? Was it the one next to you, the coke car?
A. I didn't see any go off; I just fell over; it knocked me down, and I couldn't see nothing.
Q. As nearly as you can tell, the one that first run off the track from the one that you were standing on?
A. That was the coke car.
Q. The coke car was the one next to the one that you were standing on?
A. Yes, the coke car was ahead of us.
Q. How was the wreck, and where was it as to proximity to the frog? Were the cars piled up, and on which side?
A. On the south side.
Q. Of the frog?
A. Yes.
Q. Near the frog?
A. Well, about five rails, I think, away from the frog.
Q. Opposite the frog?
A. Yes.
Q. Then when did you look at the frog?
A. Why, after I walked down to the depot I looked at the frog, walked past there, then I looked at the frog.
Q. Did you see any mark upon it, the flange of the wheel——

Mr. SHIRK (interrupting): What did you see?

27 Q. (continued). What did you see?
A. I seen on the frog, it looked as though the wheel had

run up over the frog; the marks of the car wheel running over the frog.

Q. What part of the wheel, the flange?

A. The flange, yes.

Q. Where was the frog located there, in the curve?

A. Yes, sir.

Q. What kind of a curve was it, sharp or otherwise?

A. A sharp curve.

Q. Now you know as a railroader about how fast a train of cars run—tell me how fast the train run around that curve that morning?

A. From fourteen to sixteen miles an hour.

Q. Was that faster than it should have been run in your experience as a railroader, around that curve, and over that frog?

A. They was running pretty fast around such a heavy curve.

Q. Did they, as a matter of fact, run slower afterwards?

A. Yes, they did.

Q. Do you know anything about an order issued as to their running slower?

A. I didn't see any order issued only what I heard.

(Objected to if he didn't see the order.)

Q. Did you hear it from the conductor of the train?

A. That I couldn't tell who it was from.

Q. Was it from one of the railroad officials?

A. Yes, sir.

Q. Then give us the order. What was it?

Mr. SHIRK: We want to know the official.

By the COURT: Yes, let him state.

Q. From whom did you get it?

A. That is more than I can say.

Q. Did you get it either from the conductor or from any one in their employ?

A. I think it is one of the brakemen that was telling me.

(Objected to as incompetent.)

Q. You didn't hear it from McConnell or from Cox?

By the COURT: He has said several times that he don't know from whom.

Q. But the fact remains that you ran slower afterwards all the time?

A. Yes, sir, while I was on.

Cross-examination by Mr. SHIRK:

Q. You ran just as fast frequently before, didn't you?

A. What is that?

Question repeated.

A. As we did afterwards?

Q. No, as you did on the day of the accident?

A. No, I don't believe we did, not to my knowledge.
Q. You were in the accident, you were hurt?
A. Yes, sir.
Q. What was Lewis Miller doing on that train?
A. Well, tending to his cars, as far as I know.
Q. Tending to what cars?
A. The North Lebanon ore cars.
Q. Tending to the cars?
A. Yes.
28 Q. What was he doing on that railroad? What was his position on the railroad?
Col. SELTZER: That is, if you know; if you don't know, say you don't know.
A. I seen him repairing the cars, seen him fixing the cars if anything was wrong with them.
Q. Did you see him bring the cars down from North Lebanon furnace?
A. Yes, sir.
Q. Did you see him braking?
A. I did see him braking a little, too.
Q. You saw him making repairs on his cars. There is no occasion to brake, is there? Except this side of the point of the accident?
A. That is the only place, at North Cornwall.
Q. Miller is not a brakeman, is he?
A. No, sir, not that I know of.
Q. He did that simply voluntarily?
A. Yes.

Redirect examination by Col. SELTZER:

—. This morning that the accident happened he was not braking that you saw?
A. No, he was standing on the cars.
Mr. SHIRK: Nobody else was braking at that time, was there?
A. No, sir, they didn't have time to brake.
Q. No occasion to brake?
A. No, sir.

(The witness left the stand and was recalled by Col. Seltzer.)

Q. Mr. Bluntz, Miller says that he called the attention of the conductor, Mr. McConnell, to the fast running of the train. Did you see Miller talking to McConnell that morning?
A. Yes, I did.
Q. As they were going up?
A. Yes, sir.

ALBERT GRUBER, a witness called for the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Col. SELTZER:

Q. Were you on the train when this wreck occurred?
A. Yes, sir.

Q. What was your position?
A. My position that morning was flagman.
Q. What was your usual position on the road?
A. I run as brakeman, middle brakeman, I was on, usually.
Q. At this time you were running what?
A. Hind brakeman, flagman.
Q. Why were you running hind brakeman this time?
A. The man that run as hind brakeman was not out that morning.
Q. So your crew was not full?
A. Well, no, not that morning, it was not full.
Q. You were one brakeman short?
A. Yes.
Q. Will you be good enough to describe the wreck as near as you can, and where was it?
A. It was at Cornwall.
Q. Describe it, about what part? Where was it? Was it anywheres near the frog at the curve?
A. It was around the frog. I can't exactly say——
Q. Were the cars piled up together there?
A. Yes, they were.
29 Q. How fast did they run that morning?
A. About fifteen miles an hour.
Q. Was that faster than usual?
A. Well, I don't think it was.
Q. You say it was about fifteen miles an hour?
A. Yes, about fifteen miles.
Q. Was there an order issued afterwards, or that same day, or the next day, that they should not run so fast?
A. There was an order issued but I don't know whether it was the same day or the next day.
Q. You say there was an order issued that they should not run so fast?
A. Yes.
Q. Now what was the order?
A. The order?
Q. About running so fast around that curve, was it not?
(Objected to as leading.)
A. I didn't see the order, I got it from a conductor, or brakeman, I don't know who it was; I didn't get it out of the office.
Q. As a matter of fact, did you run slower afterwards?
A. Yes, we did.
Q. What kind of a curve is that?
A. It is a sharp curve.
Q. Was this frog there in the curve?
A. Yes, it was.

Cross-examination by Mr. SHIRK:

Q. When you say the frog, you mean the frog is just where the siding starts? The frog is not in that curve, the frog is right at

the beginning where the siding runs in, and it is the siding that curves. Isn't that so?

A. Yes, it is.

Col. SELTZER: They both curve, the siding and the frog.

Q. Then, as I understand, you don't know who issued the order; you didn't see the order, and you don't know from whom you got this information?

A. No, I don't know from whom it was.

FRANK BEHNEY, a witness called for the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Col. SELTZER:

Q. What was your position on the Cornwall railroad at the time of the accident on the 16th of October, 1890?

A. I was working on repairs.

Q. At what section?

A. No. 2.

Q. Where is that section?

A. It starts a little on the other side of Lebanon, and runs out to North Cornwall.

Q. Did you help to clear up the wreck?

A. I did.

Q. And the track?

A. Yes.

Q. What time did you get there?

A. It was only about nine o'clock; I can't say exactly whether it was before or after nine.

Q. What was the condition of the track and the frog?

A. I didn't see no frog at all, and the track were tore up.

Q. You say the frog was tore up?

A. The frog was away altogether when I got there, and the tracks was tore up.

Q. The frog was out?

A. I didn't see that at all.

Q. Did you work there all day?

A. I did.

Q. Did you see any frog put in at that time?

A. No, sir.

30 Q. What did you do there?

A. We cleaned away the old stuff, took away the old cars and put in new ties, and other rails.

Q. You put in new ties and other rails?

A. Yes.

Q. You have already testified that there was no frog at all put in that day. Was the wreck—was it—show what kind of a wreck it was?

A. It was a pretty bad wreck.

Q. Did you see Lewis Miller?

A. No, they had taken him in before we got out there?

Q. Well, you knew where this frog was beforehand?
A. Well, I knew the place where it had laid; I didn't see the frog at all.
Q. It had been evidently taken away, eh?
A. Yes.

Cross-examination by Mr. SHIRK:

Q. For whom did you say you were working at the time of this accident?
A. Mr. Reinear; Samuel Reinear was my boss on section No. 2.
Q. On what railroad?
A. On the Cornwall railroad.
Q. Are you still working for them?
A. No, sir.
Q. You were not regularly employed on this section where the accident occurred?
A. No, sir.
Q. You went out the same day that the accident occurred and assisted in clearing away the track there?
A. Yes.
Q. Don't you know that the frog was there just the same as it was before at the siding that runs into Fox's store?
A. I didn't see any frog there.
Q. Do you say under your oath that there was no frog there at the time you arrived there?
A. I do.
Q. Do you say that there was no repairing done where the frog was?
A. I do.
Q. Did you see the frog there?
A. No, I didn't see the frog but I didn't look particularly for it.
Q. You assert that there was no frog there in the track when you arrived there?
A. Yes, sir.
Q. You are positive, too, that there was none put in there that day?
A. I am.
Q. And you are positive that there was no repairing done where the frog was?
A. I am.
Q. Don't you know that there was no ties put in only two?
A. We did put in ties where the track was.
Q. Who was with you and assisted you?
A. Pretty near the whole gang of No. 2.
Q. Name some of them to me.
A. There was Jacob Lowk, he was working on No. 1 section; I can't tell you the names of them. I don't remember them; I didn't write them down. It's a couple of years ago, and there was a fellow by the name of Swoop. He was second man on No. 2 section, and

there was Jacob Frontz on No. 2 section, and there was Bob Sheiner on No. 2 section, and there was Billy Miller on No. 2 section.

Q. Now will you give me some on the section in which this particular track was included?

A. There was Mahlon Smith on there.

Q. Augustus Dewalt?

A. Yes, he was foreman of No. 3 section.

Q. Henry Shrunk?

A. I don't know that.

31 Q. Don't you know that there was some more that was on his section regularly?

A. Well, there was some on there, but I didn't know them.

Q. What time did you get out there after the accident?

A. It was nearly nine o'clock.

Q. What work did you do?

A. I helped to clear up the track, put down the track, and clean away the old cars.

Q. All went to take part in the general work there?

A. Yes, sir.

Q. Who had charge of the repairing of the track?

A. I don't know, I guess Mr. Neff himself; we all had our foremen, I don't know who had charge of the track.

Q. Where did you get off the train after you got to the Cornwall station?

A. We got off right at the Cornwall station.

Q. And walked up over the track?

A. Well, it is not very far to walk.

Q. You are certain that there was no frog there at the time?

A. There was no frog there.

(The witness having left the stand, was recalled by Col. Seltzer.)

Q. Mr. Behney, what was the condition of the old ties?

A. They were rotten and broke up.

Recross-examination by Mr. SHIRK:

Q. When was this accident?

A. I didn't write it down. I might have seen it if I had looked in the book.

Q. In the year '90 or '91?

A. In the year '90.

Q. Fall, or when?

A. It must have been some time in October; I didn't write the date down.

Q. How do you know that that was the accident at which this man was hurt?

A. Because I seen him going out there in the morning and that was the only accident that occurred that year during the time that I was on.

Q. That was the only accident that occurred?

A. Yes, on that road for the time that I was on.

Col. SELTZER:

Q. You know that Miller was hurt in this accident?
A. Yes, I know that Miller was hurt.

CHARLES NEWMASTER, a witness called for the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Col. SELTZER:

Q. Mr. Newmaster, were you at this place where this accident occurred?
A. I was.
Q. Were you working there?
A. I helped to clean it away, yes, sir.
Q. What was your position?
A. I was a repairsman.
Q. In what condition did you find the wreck there, and the track?
A. From the frog it was all torn up, and the rails and track, and the sills all cut.
Q. What was the condition of the sills?
A. Some were good, and some were rotten.
32 Q. Right there at the frog, I mean?
A. I could not tell you that; I am on my oath, and I am only going to tell the truth.
Q. That's all we want you to tell. Are you employed by the Cornwall Railroad Company?
A. I was employed at that time.
Q. What did you do to the track?
A. I helped to take out some ties and put other ones in.
Q. That was right at the frog, you say?

(Objected to as leading.)

Mr. SHIRK:

Q. Where was it?
A. From Fox's store?
Q. Was it at the frog or was it not?
A. I couldn't tell you that exactly, how far from the frog.
Q. Did you see anything of a frog there that morning?
A. Yes, sir.
Q. But it was not in the track, was it?
A. It was pushed away out of line.
Q. Did you see them put a frog in at all that day?
A. I didn't see them putting in any in there.
Q. You were not around there all day?
A. Yes, until nine o'clock in the evening. We had to first clean the main track before we could put it in.
Q. Was there a frog put in there that day?
A. Not to my knowledge; they hadn't it that far yet done; we had to go the next day again.

Q. Was there a frog put in there the next day?
A. I couldn't tell about that.
Q. Did you see a frog when you came there in there?
A. I couldn't tell you.

Cross-examination by Mr. SHIRK:

Q. What time—when did you get out there?
A. I was called out in the morning between eight and nine, I think.
Q. Was Mr. Bohny with you?
A. No, I didn't know the man, yes, he was in another section.
Q. You spoke of doing certain repairs beyond the frog?
A. Putting in from Fox's store this way.
Q. That is on the siding you mean?
A. No, sir.
Q. On the main track?
A. Yes, sir, on the main track.
Q. Then you didn't do any work yourself at the frog, or where the frog was?
A. No, I didn't.
Q. No work was done that you saw at the frog?
A. Not to my knowledge that time.
Q. Don't you know that the frog remained in just as it was?
A. Well, it was pushed.
Q. How do you know it was pushed when you say you didn't see the frog? You don't know whether you saw the frog that morning?
A. I told you that I knew nothing about it.
Q. You say you don't know whether there was a frog there or not?
A. I said that the frog was pushed. I told this question.
Q. Didn't you say in reply to Col. Seltzer that you didn't see the frog?
A. No, sir.
Q. You did see a frog there that morning?
A. Yes, sir.
33 Q. That you are positive of?
A. Yes, I am certain.
Q. Were you by when the track was gauged?
A. No, I was not on that division?
Q. You know the frog was there, but you don't know of another being put in its place?
A. No, I don't, because I was not there. I didn't belong to the division I was on.
Q. How did you come to look as to the condition of the frog?
A. That I couldn't tell you.
Q. Are you positive now as you say—positive it was in?
A. Only I know that from the place out it was all one wreck.
Q. That is, the track was pushed, you mean?
A. Yes, it was bent, and all tore, and thrown out of place.

Q. Don't you know that that only started about 30 feet south of the frog that the track was pushed out?

A. I couldn't tell you.

Q. You don't say it was pushed out of place up to the frog?

A. That I couldn't tell you, no, sir.

Q. You know that it was out of place at some part of the track south?

A. Yes, south.

Q. You don't know whether it was out of place at the frog?

Col. SELTZER: He has answered that.

Q. Then I understand you to say that a certain portion of the track of the railroad was out of place south of the frog?

A. Yes, running towards Fox's store?

Q. The main line?

A. Yes, sir.

Q. But you don't say that any portion of the track at the frog was out of place?

A. That I couldn't tell; no, sir.

Q. But there was a frog there?

A. Yes, sir.

Redirect examination by Col. SELTZER:

Q. You said to me in my examination that at the frog where the wreck was, you saw that the frog was pushed out of place. That is true, isn't it?

A. Yes, sir.

Q. You say that that frog—when you were a repairsman you saw the frog, and that frog was pushed out of place?

A. Yes, when we came there that morning after the accident.

Q. Now, Mr. Shirk wants to get you to say, and asks you the question, that there was not anything pushed out of place until about 30 feet further away?

A. No, you see the whole thing was pushed out of place, that is what I mean.

Q. Now, then, you are as positive as you are alive that that frog was pushed out of place, and that you didn't see any new frog put in that day?

A. No, not while I was there.

Q. If it had been there, you would have seen it?

A. Yes, sir.

Q. How long did you say you worked there?

A. We worked there that day, and the next day we went out and unloaded them cars and took them off.

Q. You have already testified that you took the old sills out?

A. Yes, they were cut up.

Q. Where was it; how was the condition when you came up there to that frog as to its being torn up?

(Objected to as leading.)

A. Well, you see as the frog laid that way (indicating) these rails was all tore out, you understand.

34 Q. How was the frog?

A. The frog was kind of pushed I say. That is all I can tell you because I am no boss of a railroad; I don't know nothing about a railroad in that way. The boss must know it.

Recross-examination by Mr. SHIRK:

Q. What did you mean by saying to me that the track of the railroad, south of the frog, and away from the frog, was shoved out of place, but that you don't know how the rails were, immediately south of the frog, or how the frog itself was?

A. It was as I told you, pushed.

Q. Why did you say in reply to my question that you didn't know that, how that was?

—. Well, I will tell you the cause of that, is this accident was happened before I came out there. I don't know how it happened, or whether the rails done it.

Q. Do you want to say to us positively that the frog or the rail immediately south of the frog on the main line was out of gauge, out of place?

A. It was pushed, as I told you.

Q. How was it pushed?

A. You see the rail was away from the frog.

Q. Pushed to the east or to the west?

A. Westward, towards Fox's store; that lies west, right in that direction that was in this side here (indicating). Ain't that west?

Q. Yes, that is west, but I can't understand how you testify so differently, when you was examined in chief and on cross-examination—did you see the frog that morning?

A. I did.

Col. SELTZER: I want to have the defendant's attorney bring in their order, that special order that was made as to the running of the train, immediately after the accident. I would like to have it now.

Mr. SHIRK: I am sorry to say that I cannot furnish you something that I have not.

Adjourned to half past one p. m.

TUESDAY, *March 8th*, 1892—half past one p. m.

Court convened pursuant to adjournment.

LEWIS MILLER recalled for further recross-examination by Mr. SHIRK:

Q. You said after the accident you were taken to Fox's store?

A. Yes.

Q. And from there you went down to the Cornwall station?

A. Yes.

Q. What course did you take going from the store to the station?

A. Well, I went along the walk.

Q. You went along the public road, didn't you?

A. Yes, sir.

Q. Outside the fence?

A. Outside, of course; I couldn't get through the cars where the wreck was.

Q. You are aware that at one time you were not permitted to run more than twenty cars, and that if you carried more than twenty cars, you were charged an additional freight rate for the additional cars?

A. Yes, for years back.

Q. You were only charged on those beyond the twenty?

A. No, I was allowed so many cars; I had different rates; they allowed so many eight-wheelers, they allowed — eight-wheelers and they allowed fifteen four-wheelers, and all that was over that, what I didn't take a man along with, of course they charged extra freight for the company.

Q. Yes, when it was over that number?

A. Yes.

Q. What kind of a fence was running along at the railroad at that point?

A. That was a pale fence.

Q. A high pale fence?

A. I couldn't tell you how high it was; it was a pretty high fence.

Q. Between you and the frog there were also a number of cars, were there not, as you passed down from the store?

A. You see I came out below where I was thrown off; I was took in the store.

Q. I mean as you came back from the store to the station there were a number of cars between you and the frog, were there not?

A. For that matter there was a car laying on the store door, one of my cars was laying very near the store-step.

Redirect examination by Col. SELTZER:

Q. You could see through the paling of the store fence, couldn't you?

A. O yes, good.

Q. Explain how these cars that Mr. Shirk has asked you about were carried, what that arrangement was?

A. They had a rule of men fetching so many cars and when he had more than that amount of cars, the company charged three cents excess to get over the road, except they fetched a man along; that was the company rate.

Q. This rule was not in force at this time?

(Objected to: I would like to know whether he has any knowledge on that point, if he wants to go into any revocation of that rule.)

Q. What was the custom about that rule?

A. They would not move the cars over the road except I would take a man along and pay his fare.

Q. At this time this rule was not enforced at all?

A. No, sir.

Q. This rule was not enforced any more at the time of the accident?

A. No, they had the rule throwed overboard.

Q. That was the time when the opposition began?

A. Yes, Mr. Brock had complained about it, went in the office to Mr. Hammond, and they had throwed it overboard. They didn't charge it any more after that.

Q. Didn't they also reduce the freight rates?

(Objected to.)

By the COURT: I don't see that the reduction of the rates has anything to do with the matter.

Col. SELTZER: I desire now to ask Mr. Miller what Mr. Neff, the superintendent, said when he notified him of the condition of the frog. This for the purpose of showing that Mr. Miller performed his duty, and was not guilty of concurrent negligence, and that the company was not relieved from liability. I have a case here and I would like to read it.

Mr. SHIRK: Objected to, first, because indefinite as to time when the complaint was made, and second, as incompetent.

(Discussion.)

(Offer read by the stenographer to the court.)

By the COURT: This offer is so indefinite that we cannot rule upon it intelligently, and for that reason it must be rejected.

(Exception by plaintiff.)

36 Col. SELTZER: I make the same offer with the exception that this notice was given to Mr. Neff some eight or nine days before.

By the COURT: That is open to the same objection.

Col. SELTZER: Will your honor grant an exception?

By the COURT: Certainly.

Col. SELTZER: I now make the following offer: That Lewis Miller told Mr. Neff, the superintendent of the railroad, some nine or ten days before, that his car had jumped on the track at the frog, and that there was something the matter with the frog, and that it ought to be fixed, and that Mr. Neff promised to fix it.

Mr. SHIRK: For what purpose?

Col. SELTZER: For the same purpose, to relieve him of concurrent negligence.

(Objected to unless accompanied by an offer to prove that there was a failure to do that which he promised.)

Col. SELTZER: I expect to prove that also, of course

By the COURT: I think this is specific enough to be admitted.

Q. Go on and state to this court and jury whether you told Mr. Neff—what you told Mr. Neff and when, and what answer he gave to you?

A. I told Mr. Neff—I went to Mr. Neff in the yard that morning that this occurred, and I told him that it had throwed my car up on a rail, I told him that I was nearly off the track there at that

frog, and that he had better look after it, and he told me that he was going to attend to it, so I thought he did.

Cross-examination by Mr. SHIRK:

Q. Then you did think he had attended to it?
A. I didn't know.
Q. You said to me in your reply awhile ago that you went out and examined it?
A. So I did, when I found out that he didn't attend to it.
Q. Then you did find that he didn't attend to it, a few days afterwards?
A. Yes, sir.
Q. And you still continued to run on these cars?
A. That morning right after, this here thing occurred then.
Q. Which morning?
A. The 16th morning, that time I gave you the testimony before.

Col. SELTZER:

Q. State it to me now?
A. I said to him that I had examined the frog, of course right after that we had this accident.
Q. You don't know when afterwards?
A. I hadn't it wrote down.
Q. Then you don't know how many days before the accident?
A. No, I couldn't tell you that.
By the COURT: Do you mean that you went to look at it before the accident? Do you mean that you went to see where it had been fixed after you told Mr. Neff and before the accident?
A. That was before the accident a couple of days.
Q. You don't know whether he had fixed it or not?

Col. SELTZER: What did he say?

A. No, he hadn't fixed it.
By the COURT: The witness says he saw at that time that it had not been fixed.
Col. SELTZER: When?
By the COURT: Two or three days before the accident.
Mr. SHIRK: You saw it on the train?
A. No, I walked out there towards Cornwall to my train.

37 HARRY COX, a witness called for the plaintiff, having been first duly affirmed, testified as follows:

Direct examination by Col. SELTZER:

Q. Mr. Cox, what is your position on the railroad? What is your present position?
A. Freight conductor.
Q. What was your position on the 16th of October, '90?
A. Well, from about eight o'clock until the present time, I conducted the freight. Before that I had been working at West Lebanon.

Q. Did you receive any order as to the running of trains around that curve there?
A. Yes.
Q. What was that order and from whom did you receive it?
A. I received it from the train-runner.

Mr. SHIRK:

Q. Who is the train-runner?
A. Mr. John Urich at that time.
Q. What was the order?
A. To reduce speed to eight miles between Cornwall and South Cornwall.
Q. This accident happened between those points?
A. Yes, sir.
Q. And from there the order was now that you should reduce the speed to eight miles an hour?
A. Yes.
Q. How soon after the accident did you get the order?
A. I couldn't tell you exactly the time.
Q. Was it the same day?
A. Yes, sir.

No cross-examination.

Captain H. T. HOUSTON, a witness called for the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Col. SELTZER:

Q. You are manager at North Lebanon furnace?
A. Superintendent at the North Lebanon furnace.
Q. You are acquainted with Lewis Miller?
A. Yes.
Q. Were you superintendent at the time this accident occurred, Captain?
A. Yes.
Q. Now in the matter of going with the cars there across that road, was it understood that a man——

Mr. SHIRK: I would like to know what he proposes to prove by Captain Houston.

Col. SELTZER: I propose to prove by Captain Houston that in their contract with the Cornwall Company, that in sending their cars, they were to take a man along. They paid the freight and that included a man to go along with their cars.

Mr. SHIRK: Then the contract is what you want to prove. There is no objection to that.

Col. SELTZER: I want to show that Miller was a passenger.
(Question objected to in that form.)

Q. You sent your cars over that road, didn't you?
A. Yes.
Q. What are the conditions?

By the COURT: What was the arrangement at that time, October, '90?

A. That I can't tell, that there was any special arrangement, because the cars had been sent in that shape for the last twenty years, that I know, accompanied by a man. That is all, whether there was any written contract I don't know; that was the custom.

38 Q. Did you send a man along with the cars, and was he taken over?

Mr. SHIRK: The same objection. I will have to make the same objection again. The captain is an intelligent witness. I object to it as leading.

Q. What were the duties of Miller?

A. His duties were to take away cars from our yard, and take them over and see that they were attached to their train.

By the COURT:

Q. What were his duties after that?

A. He was then under their instruction. He was under their guidance after that, but we considered it was his duty to take them out to see that they were taken to the ore banks and back.

Q. That was his duty to take the cars out and bring them back?

A. Yes, he was under their instructions, he was while he was on their road, he was under their instructions.

By the COURT: It is perfectly plain from the testimony of Miller himself that he was employed on that road under the act of '68. This testimony only makes it more plain if possible.

Q. Who paid for these cars that were wrecked?

(Question objected to.)

By the COURT: The question is irrelevant.

Exception to the ruling of the court by the plaintiff.

FRANK BEHNEY, recalled by the defendant for further cross-examination, by Mr. Shirk:

Q. How long had you worked on railroad and repair work on railroads at the time of this accident?

A. I couldn't say exactly. I came onto the railroad on the 8th of June.

Q. And were you working on the railroad from that time on?

A. Yes.

Q. Do you know what a frog is?

A. Yes, I do.

Q. Would you know whether there was a frog at any time south of the Cornwall station?

A. Yes, I did see one at some time.

Q. Where was it located?

A. It was on the other side of the Cornwall station.

Q. Where did the siding run to?

A. To Fox's store.
Q. Where was the frog with reference to the siding?
A. It must have been certainly on the other side of the switch.
Q. And wasn't there that day?
A. I didn't see any.

Mr. SHIRK: Now, if your honor please, I desire to make a motion for a compulsory nonsuit, and my reason is, that there has been no negligence shown on the part of the defendant, and before making that motion, I desire to make a motion to strike out all testimony leading to the condition of the road, or any portion of the road not relating to the frog, and then follow it by making a motion for a compulsory nonsuit.
(Discussion.)
Mr. SHIRK: And secondly, under the plaintiff's statement, he assumed the risks of the negligence which he alleged to have existed.
By the COURT: You will have to call your witnesses. We will reserve this question, and decide it when the proper time comes.

39 ELMER E. SHARTEL, a witness called for the defendant, having been first duly affirmed, testified as follows:

Direct examination by Mr. SHIRK:

Q. What is your occupation?
A. Photographer.
Q. Did you take this photograph? (Exhibiting photograph to witness.)
A. Yes, sir.
Q. What does it represent?
A. It represents the frog south of the Cornwall station.

Col. SELTZER: I would like to ask Mr. Shirk what this photograph is for.
Mr. SHIRK: I am not making any offer; I am merely identifying it for the present.

Q. Of the frog, the first frog south of the Corwall station?
A. Yes, the first frog.
By the COURT: When was this photograph taken?
A. On Saturday.
Q. Last Saturday?
A. Yes, sir.

AUGUSTUS DEWALT, a witness called for the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. SHIRK:

Q. What is your occupation?
A. Track foreman on the Cornwall railroad.
Q. For how long have you been thus occupied?
A. Going on nine years.

Q. What portion of the railroad have you charge of?
A. Well, I have charge from North Cornwall Junction to Miner's village.
Q. The first frog south of the Cornwall station is in that section?
A. Yes, sir.
Q. When was that frog put in—first, what sort of a frog was there on the 16th of October, '90?
A. It was a spring-rail frog fifteen feet long.
Q. What make?
A. Pennsylvania Steel Company.
Q. Was it a frog in use upon that road only, or was it a frog in general use?
A. It was a frog in general use.
Q. When was it put in?
A. About one or two days before the accident.
Q. Are you positive?
A. Yes, sir.
Q. What was its condition when it was put in?
A. Good.
Q. When was the guard-rail there put down?
A. That I can't tell you.
Q. What was its condition?
A. Right.
Q. When did you *guage* it last before the accident?
A. That is more than I can tell you.
Q. Did you or not *guage* it at the time you put it in?
A. Yes, sir.
Q. When did you first go to that frog after the accident on the 16th of October?
A. About a quarter of seven o'clock.
Q. What condition did you find the frog in then?
A. All right.
Q. What condition did you find the guard-rail in?
A. All right.
Q. Did you *guage* it at that time?
A. Yes.
40 Q. Who was present with you when you *guaged* it?
A. Me, Harry Shunk, Amos Shunk, Mahlon Smith and several others. I couldn't mention the rest.
Q. How was the *guage* then?
A. Right.
Q. How was the position of the frog?
A. Right exactly at the place.
Q. What was the condition of the frog?
A. Good.
Q. Where is that frog now?
A. Right at the same place.
Q. Been in use there ever since?
A. Yes, sir.
Q. When was a train first taken over it after the accident?

A. Maybe an hour afterwards we pulled the wreck across back over; some of the wrecked cars.

Q. Where was the track torn up?

A. About 20 feet south of the frog.

Q. Where were the sills torn up?

A. Twenty feet back.

Q. Were the sills at or near the frog disturbed?

A. No, sir.

Q. Was the track at or near the frog disturbed?

A. About 20 feet back of the frog, I mean south where the wreckage was.

Q. You say this frog has been in use at that place ever since unless somebody took it out at night.

—. ——.

Q. You have had charge there ever since, of the repairs at that point?

A. Yes.

Q. What was the object of the guard-rail?

A. That is I suppose to guard the flange into the frog, to keep it on the track where the train is moving on.

Q. Has there been any change so far as the frog or guard is concerned?

A. No, sir.

Q. What was the condition of the sills?

A. We did, after changing the sills, then I changed the guard-rail of course.

Q. When was that?

A. That was about two weeks—the first of November I put the sills in.

Q. Who changed the sills?

A. Yes, then I changed the guard-rail, put a longer guard-rail on.

Q. Then the guard-rail that is on at the present time, is not the same guard-rail that was on at that time?

A. No, sir.

Q. But the frog is the same?

A. Yes, sir.

Q What was the condition of the sills changed?

A. They were good.

Q. You say you have been railroading for how many years?

A. I have been railroading about fifteen years altogether.

Q. Is it a very unusual thing for freight cars, when the tracks are in good condition, to jump the track?

A. No, sir.

Q. What might cause it, when the track is even, in a perfect condition?

A. Different things might cause the run-off, something might get down under a car, or a truck not slewing under the car.

Q. What do you mean by not slewing?

A. Why, run a straight track, and not subjecting themselves to the curve, and then go off the *the* track.

Q. Is that liable to occur even when a track is in perfect condition?

A. Yes, sir.

Q. Can you state the reason for substituting other sills?

A. Well, of a rule, when we begin to put in ties, we take the whole thing out as far as we go.

41 Cross-examination by Col. SELTZER:

Q. You are employed by the Cornwall Railroad Company now?

A. Yes.

Q. When did you enter its employ?

A. Eight years ago on the 18th day of February, last month.

Q. What was your position, when you got there?

A. Supervisor.

Q. Now you say there was nothing wrong at the frog?

A. Yes.

Q. Nothing wrong with the guard-rail?

A. No, sir.

Q. Nothing wrong at the sills?

A. No, sir.

Q. When did you look at the guard-rail before? You said that you didn't look at the guard-rail.

Mr. SHIRK: No, he didn't say that.

A. Well, I walked over the road. It was my business to look at it.

Q. You did look at it and everything was perfect?

A. Yes, sir.

Q. Were you taking out sills the evening before, along there?

A. No, sir.

Q. No sills taken out?

A. No, sir.

Q. Right near there, I mean?

A. No, sir.

Q. Didn't you raise the track and take out the old sills the evening before?

A. No, sir.

Q. So you say when everything is perfect——

The WITNESS (interrupting): Yes, sir.

Q. (resumed). When everything is perfect, you say that the cars might run off the track?

A. Yes, sir.

Q. Is it more likely that they should run off the track when there is a defect in the construction of the road?

A. Yes.

Q. It would?

A. Yes.

Q. Supposing that had been the testimony of three witnesses to that effect——

(Objected to as clearly argumentative.)

Q. You took out those sills, all of them, about six days afterwards?

A. About two weeks afterwards.

Q. You put a new guard-rail there?

A. Yes, sir.

Q. Why didn't you leave the old guard-rail there if it was so perfect?

A. I will tell you why. The old guard-rail that was there was short and I thought the guard-rail put in would make the whole thing more substantial.

Q. Then it was not perfect after all?

A. Yes, it was.

Q. Why did you want—you have already testified that it was perfect, why then did you take and put the new guard-rail there?

A. After I renewed the timber, I put the new rail there.

Q. You say that was to make it more perfect?

A. Well, it would look better, everything to match, everything new.

Q. It is a sharp curve there, isn't it?

A. Yes, a tolerably sharp curve.

Q. Isn't it better to have a long guard-rail there than a short one?

A. Yes, it is.

Q. It is?

A. Yes.

Q. Then it was not quite as perfect as you thought—if the sills were perfect, why didn't you leave the sills in there?

A. Well, I say when we began to put in the ties, we put them in the whole business.

42 Q. You mean to swear that if there was a perfect tie there, you took that out and put in another?

A. Yes, we done that right along, if the ties would not have been good, under this guard-rail it would have tore the guard-rail off, which it didn't do.

Q. Does it touch the guard-rail when it runs on the other side?

A. O, yes; yes, sir.

Q. Isn't that only a protection?

A. That is all right enough, but it touches it.

Q. You say you took a perfect tie up there?

A. Yes, we took good ties out.

Q. Did you examine the ties at the frog?

A. Yes.

Q. And you mean to tell me that you took out ties that were perfect?

A. We did do that right along.

Q. Did you think you would be called up as a witness?

A. No, sir, I didn't.

Q. Did you take all the ties, every one of the ties around that curve out?

A. Yes, sir, every one.

Q. How long were those ties in there before?

A. About as near as I can tell, about six or seven years, I guess.
Q. And not one of them was rotten?
A. No, sir.
Q. Not one?
A. Not totally rotten.
Q. When you took out these ties, didn't you raise them?
A. We raised the track a little, of course.
Q. Didn't you elevate the track?
A. Why, certainly, what belonged to it.
Q. In the first place you made it in good condition, that is what you did, the road there. Is that so, or isn't it?
A. The road was in good condition.
Q. Why did you elevate it then, if it was in perfect condition?
A. When you go to work at a railroad you have got to go to work and dig the dirt out.
Q. Why did you elevate it? Why did you go there and change the whole thing, and make it more perfect?
A. We can't go to work and let a railroad lay until it is clean wore out. We have got to renew it. I mean, it was safe.
Q. It was not perfect, it was safe?
A. Yes, sir.
Q. Why did the train run off the track then?
A. Nobody knows that.
Q. I understand you to say now that it was not perfect, but it was safe. Is that what I understand you to swear to—is that what I understand you to swear to? Answer me the question.
No response.
Q. I ask you this question which I asked you before, and you didn't give an answer to it. Why did you elevate that track if that track was perfect?
A. Why I did?
Q. Yes. You said before it was because you meant it was safe?
A. When you work at a track, it always comes up, it don't go down.
Q. You changed the track. Why did you change the track if the track was perfect?
A. That is what I say, when we put in timber that way, we begin at one end and take all the ties out and put in new.
Q. Do you mean to say it was not perfect, but safe?
A. Safe is perfect too, to a certain extent.
Q. Why did you change it if it was perfect?
A. Of course we was working there the day before putting on new rails, and after that was done——
43 Q. The day before the accident?
A. (resumed). A day or so before the accident—after that was done, then we begin and put in the timber.
Q. To make it perfect, eh?
A. Of course it needed repairs, as all railroads do.
Q. You were working there the night before the accident?
A. Yes.

Q. The night before the accident you were working there and repairing that road?
A. Yes, sir.

Redirect examination by Mr. SHIRK:

Q. You were repairing the railroad at the time, weren't you?
A. Yes, sir.
Q. You were working on it before, weren't you? Leveling it up and putting in new timber?
A. Getting it leveled up, yes, sir.
Q. I mean the twelve days after this time.
A. Yes.

HENRY SHUNK, a witness called for the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. SHIRK:

Q. Mr. Shunk, where were you employed on the 16th of October, '90, and by whom were you employed?
A. By Mr. Dewalt.
Q. What road?
—. On the Cornwall railroad.
Q. What was your position?
A. No. 3.
Q. What were you? What was *was* your business?
A. Railroading.
Q. What particular branch of it?
A. How do you mean?
Q. Were you a repairman?
A. Yes.
Q. When did you go into the employ of the Cornwall railroad?
A. I think it was——
Q. (Interrupting.) Not the exact day, but how long before the accident; about?
A. Well, about fifteen months.
Q. Were you employed only about thirteen months?
A. Yes.
Q. When did you leave them?
A. In June.
Q. What year?
A. '91.
Q. Do you remember the frog south of—the first frog south of the Cornwall railroad station on the main line?
A. I do.
Q. At which the accident occurred?
A. Yes, sir.
Q. When was that frog put in?
A. That was put in the 15th and the 16th of October the wreck was.

Q. Did you assist in the work?
A. I did.
Q. What kind of a frog was it?
A. It was fifteen feet long, and it was a Pennsylvania steel frog.
Q. A stiff or a spring rail?
A. A spring rail.
Q. What did you do at the track at the time you put it in? Was the track guaged?
A. Yes.
Q. How was the guage?
A. The guage was all right.
Q. What was the condition of the frog?
A. The frog was all right.
Q. And the guard-rail?
A. That was all right.
44 Q. When did you get there on the following day?
A. When the wreck was, you mean?
Q. Yes.
A. We got there about seven o'clock.
Q. Who was with you?
A. Dewalt, and Mahlon Smith and my brother, Amos Shunk.
Q. What did you do there at the frog?
A. We went back then and guaged it, and it was just the same way as we left it.
Q. How was the frog?
A. The frog was all right.
Q. Was there any change made in the track that day at all?
A. No, sir.
Q. Was there any change made while you were there at all?
A. No, sir.
Q. The same frog there?
A. Yes, the same frog.
Q. Were any of the sills at or near the frog, or how was the track affected by this accident, and what portion of it?
A. Well, about twenty feet back north, the ties and everything was tore up.
Q. How was it at the frog?
A. At the frog it was everything all right there.
Q. How was it twenty feet south of it, I mean between the frog and the twenty-foot point?
A. I said twenty feet back, there was everything torn up.

By the COURT:

Q. Which way do you mean when you say back?
A. South.
Q. On the other side how was it?
A. It was all right.
Q. You are not now in the employ of the railroad company?
A. No, sir.
Q. What are you doing?
A. Working on the farm.

Cross-examination by Col. SELTZER:

Q. When did you leave this company?
A. In June.
Q. You say that everything was all right there?
A. Yes.
Q. You *gua*ged the frog yourself?
A. I did.
Q. Are you a railroader? Do you understand how to *gua*ge a frog?
A. I think I do.
Q. How long have you been at it?
A. I have been at it five years.
Q. You think you understand all about it?
A. I think I do.
Q. The road-bed was all right there, too, at the frog?
A. Yes, sir.
Q. Were the ties old or new?
A. The ties was not just exactly new, but they were not old.
Q. If everything was all right, why did they tear up this thing and put in new ties, and raise the road-bed?
A. Because they was long standing; when we commenced at one end, we had to take everything out and put in new.
Q. Would you have taken these out if the accident hadn't happened? I ask, didn't you have orders to take these out just after the accident happened?
A. No, not exactly right there. We had orders to take it out before.
Q. You had orders to take it out all along there before the accident?
A. Not exactly there.
Q. There and elsewhere?
A. Not there, because we wasn't there yet.
Q. But you were going to go there, weren't you?
A. Yes, but we weren't there yet.
Q. On this very day you were going to go there, weren't you?
A. No, sir.
Q. You intended to go there?
A. Not that same day.
Q. You say you had orders to tear this up, right up there? Had you orders or had you not?
A. Of course we had orders to keep the track in good condition.
Q. How did you keep it in good condition? By tearing this up and putting new ties in?
A. We did, we kept it in good condition all along.
Q. Then you were to go around there and put new ties in and fix up the road-bed?
A. But just as I said; we weren't there yet, but the ties that we took out was good.
Q. You had begun, though, hadn't you, to repair that road?
A. Sir?

Question repeated.

A. Yes, we had begun.

Q. Is it your idea, when everything is all right, that you have to go and repair it?

(Objected to.)

A. I mean when the track is all right that the trains can run on, and when it ain't right, then the trains can't run on it.

Q. You mean when the track is all right only so that the train can run on it, that is what you mean by all right?

A. When the track is not right, then the train can't run on it.

Q. You say that when a track is so that the cars can run over it, that is what you mean by its being all right?

A. Yes, sir.

Redirect examination by Mr. SHIRK:

Q. You were employed as a repairman, and were repairing all the time, weren't you? That was your business?

A. Yes.

Q. What do you mean by *guaging*? When you *guage* the track, how is that done, when you *guage* it?

A. He don't make it exactly *guage*, that is on a frog, if you do it is too tight.

Q. Did you measure the distance between the tracks, is that what you mean by *guaging*?

A. Yes, and a *guage* is four foot, eight inches and a half long.

Q. What was the *guage* the day after the accident?

A. It was just the same.

Q. What distance—you say the *guage* is four foot, eight inches and a half. What was the *guage* when you *guaged* it after the accident?

A. Why, four foot, eight inches and a half.

Recross-examination by Col. SELTZER:

Q. What do you mean by *guaging* frogs?

A. Because it must be *guaged*.

Q. How is it done?

A. You have to lay your *guage* down on the side of the main rail, and lay it down right at that point on the frog.

Q. Did you ever lay a frog down?

A. I helped to lay some down, yes, sir.

Q. Did you make an examination of this frog before the accident?

A. I did.

46 Q. What for?

A. Because that was our duty.

Q. Was that the night before?

A. The night before, yes.

Q. While you were tearing up and fixing up the frog?

A. We had tore up a piece and put a frog there.
Q. The night before?
A. Yes.

MAHLON SMITH, a witness called for the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. SHIRK:

Q. Mahlon, where were you employed on October 16th, '90, and by whom?
A. On the Cornwall railroad.
Q. What were you doing for them?
A. Working as a repairer.
Q. When did you enter into their employ?
A. On the 21st of March, '90.
Q. Are you still working for them?
A. Yes.
Q. Do you know the frog, the first frog south of the Cornwall station?
A. Yes, sir.
Q. When was that put in?
A. It was put in a day or two before the accident occurred.
Q. Did you help to put it in?
A. I did.
Q. What was its condition?
A. The frog was good.
Q. What was the condition of the guard-rail?
A. I can't say nothing about the guard-rail because I didn't pay any attention to that.
Q. What was the condition of the sills at or near the frog?
A. The sills was in such condition that they were not unsafe.
Q. When did you gauge the track at the frog?
A. How do you mean? When it was put in?
Q. Did you gauge it then?
A. When it was put in, yes.
Q. Were you there immediately after the accident, or shortly after the accident?
A. Shortly after it, yes.
Q. Did you see the frog then?
A. I did.
Q. Did you see the guard-rail?
A. I seen that, but I didn't pay no attention to that.
Q. What was the condition of the frog?
A. The frog was gauged like it was when it was put in.
Q. And its condition, how was that?
A. Well, good.
Q. Where is that frog now?
A. At the same place.
Q. Been in use ever since?
A. To the best of my knowledge.

Q. You have been working on that section ever since?
A. Yes.
Q. No changes made that you assisted in, in the frog?
A. No.
Q. What was the condition of the track? What effect did the accident have upon the track?
A. Well, the accident had this effect upon the track, that beyond; that is, south—that it broke ties and broke a rail.
Q. How far south of the frog?
A. That I couldn't tell you, just exactly the distance.
Q. As near as you can?
A. No, I can't do no guess-work.
Q. I don't want you to guess.
A. I didn't measure it, so I couldn't say how close or how far it was away.
Q. Can't you tell nearly how far?
A. No, I didn't pay no attention to just how close it was.
47 Q. Was it within fifteen feet of the frog?
A. I couldn't say that.
Q. Did you guage—was the track guaged at the frog immediately afterwards?
A. Yes, sir.
Q. Do you remember when a train first run over it after the accident?
A. I do not.

Cross-examination by Col. SELTZER:

Q. You have already testified that you removed these sills?
A. Yes, sir, that is, along the frog they were removed.
Q. You said you didn't consider them *un*safe? Were they rotten? Did they show that they were rotten and worn?
A. Well, they didn't just show that they were worn.
Q. There are new sills put there now?
A. Yes, sir.
Q. You put them down on the first of November?
A. Yes, we put them down.
Q. This accident occurred on the 16th of October?
A. On the 16th; yes, sir.
Q. You can't say as to the guard-rail?
A. No, sir.
Q. And you would not say how near at the curve, from the frog, that the wreck was?
A. No, sir.
Q. You are a repairsman. On the night before you were working on the track right there?
A. We were working around that track just between Cornwall and South Cornwall.
Q. And near this switch?
A. No, we was beyond the switch.
Q. How far?

A. I couldn't tell you that.
Q. Well, it was not far?
A. Well, I couldn't tell you how far.
Q. You were going toward the switch? You were working northward, weren't you?
A. To the best of my knowledge we were working away from the switch, putting rails on.

Redirect examination by Mr. SHIRK:

Q. You changed sills there since, haven't you? You changed them last August?
A. Yes, we did that.
Q. You are repairing all the time, aren't you?

(Objected to as too remote.)

A. Yes, sir.

JOHN MCDONALD, a witness called for the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. SHIRK:

Q. Mr. McDonald, what is your business?
A. Supervisor of the C. & L. railroad.
Q. Of the Cornwall and Lebanon railroad?
A. C. & L., yes, sir, Cornwall & Lebanon.
Q. How long have you been employed upon a railroad?
A. Since '60.
Q. In what capacity?
A. Three years as track repairman, nineteen years and three months foreman of a gang, and the rest part supervisor.
48 Q. Did you make an inspection immediately south of the Cornwall railroad station?
A. I did.
Q. At my request?
A. Yes.
Q. When?
A. I made it one day last week, and I made an inspection this morning.

(Objected to because this is not about the time—it is long subsequent to the accident. You can't manufacture any testimony after the fact in the case—the accident occurred nearly two years ago.)

An offer asked for by Col. Seltzer.

Mr. SHIRK: I want to prove the condition of the frog after being used for all this time.

Q. What kind of a frog did you find there?
A. I found a spring frog, standard frog, Pennsylvania Steel Company make, in good order.
Q. Is it a frog in use only on one road or on different roads?
A. Used on all the roads in the country, that stamp, sixty pound steel, all roads that I know of anywheres.

Q. From your experience in railroading, can you state whether or not the derailing of trains at frogs is a usual occurrence in freight cars, even when the road-bed, frog, and track are in perfect condition?

A. In some cases they are derailed, that is, a loose wheel will throw a car at a frog, a bent axle will do it and sometimes the car won't curve, the truck is rigid and it will raise off the rail.

Q. Can any protection prevent that?

A. No, sir, not as I know of, I have never come to that point yet to know that they could.

Cross-examination by Col. SELTZER:

Q. You don't know of any broken axle at that morning's accident, do you?

A. No, I know nothing about the axle at all.

Q. You are simply stating what might cause an accident?

A. Yes, that it would throw a car off the track—different things.

Q. A poor guard-rail would do it too, wouldn't it?

A. That is just according as to how the guard-rail is. If it was not in position it would throw a car off.

Q. Suppose the guard-rail was out of line, and the frog was not in line. Would that throw a car off the track?

A. Some cars it might and some cars it might not.

Q. Especially when they go faster than they should around a curve?

A. I couldn't say.

Q. You say that was a standard guard-rail and frog?

A. Yes, that is the standard for a guard as well as the frog.

Mr. SHIRK: If the guard-rail was four inches from the track what would the probability be?

A. Why, that the engine and all would go into the siding.

WILLIAM G. CHRISTIAN, a witness called for the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. SHIRK:

Q. What is your business?

A. Supervisor on the Lebanon Valley railroad.

Q. How long have you been engaged in railroading?

A. About twenty years.

49 Q. You are supervisor on the Philadelphia & Reading railroad?

A. Yes, sir.

Q. Did you make an inspection of the frog on the main line of the Cornwall railroad, south of the Cornwall station at my request, and if so, when?

A. I did so last week.

Q. How did you find the frog?

A. The frog was in good condition.

Q. Mr. Christian, from your experience in railroading—how long did you say you had been employed, or engaged in railroading?

A. I have been here about seventeen years as supervisor. I have been engaged before that in different positions.

Q. From your experience in railroading, will you state whether the derailment of trains, if the track is in perfect condition, is of usual occurrence, or very unusual occurrence?

A. It occasionally happens in that way on account of loose wheels, bent axles, or concussions of trains where the cars are jarred together or pulled apart suddenly, the wheels are raised sufficiently to get on the wrong side of the track.

Q. Any other causes?

A. On a perfect track?

Q. Yes, on a perfect track.

A. The trucks will bend when the cars are loaded so that the bearing body of the car comes in contact with the cross-head of the track, preventing the truck from curving under and leaving the straight line—the truck will run directly straight over the track instead of following the rail.

Q. Will any amount of precaution prevent that?

A. I don't know that there is anything to prevent that with the cars in use; there is nothing to prevent that; that cannot be prevented, unless they change the building of the cars. When they overload them freight cars are more liable to derail than passenger cars. Passengers are allowed considerable more clearance, and are not so likely to get off the track.

Q. What would be the effect of the guard-rail four inches from the track?

A. If it was four inches away, a wheel running up against a sharp curve will naturally run on the wrong side of the frog if there was no guard there for it. Four inches I would not consider a guard.

Q. It would be practically no guard?

A. Yes.

Q. Your experience in railroading—with your experience, with a frog of that kind properly protected by a guard-rail, would fifteen miles an hour be an excessive speed?

A. No, sir.

Cross-examination by Col. SELTZER:

Q. Wouldn't it be too much speed in a curve, going around a curve, a sharp curve?

A. No, not that kind of a curve.

Q. You simply examined the frog? You don't know what was there when the accident occurred?

A. No, I know nothing of the accident at all.

Q. Supposing that the guard was so wide away that you could put your hand between it and the track rail, was that too wide?

A. Sir?

Question repeated.

A. Yes, that would be too wide.

Q. And that would cause a train to run off the track in going around the curve?

A. It might, especially where the point was directed toward it.

50 Q. Supposing then too, that the guard was short. Would that contribute to the running off the track?

A. No, that has nothing to do with it. The guard is made right directly at the point.

Q. Supposing that the frog was out of line. Would that contribute to it?

A. Yes, if the point of the frog was directed inside the line of curve, the chances are that the wheel might catch even if it was properly guarded.

Redirect examination by Mr. SHIRK:

Q. What effect would it have upon an engine passing over with that much of a break?

A. Why the same result where an engine goes over the car naturally would follow.

HENRY ZELLER, a witness called for the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. SHIRK:

Q. Where are you employed? Where do you work?

A. For the Lebanon Valley Railroad Company.

Q. What is your work?

A. Track foreman.

Q. How long have you filled that position?

A. Twenty-nine years.

Q. Did you look at the frog on the main line of the Cornwall railroad, the first frog south of the Cornwall station, and if so, where?

A. I did, not until last week.

Q. How did you find it?

A. In good condition.

Cross-examination by Col. SELTZER:

Q. You didn't see this frog at the time of the accident, did you?

A. I did not.

Q. You can repair a frog, can you?

A. Yes.

Q. A person can repair a frog, can't he?

A. O, yes.

Mr. SHIRK:

Q. Mr. Zeller, please state whether the fact of the guard-rail being short would make a difference?

A. Well, it would make a difference if the guard-rail was too short.

Q. How short?
A. If the guard-rail was fifteen feet long, it is sufficient.
Q. Would it necessarily have to be fifteen feet?
A. You can make it sufficiently shorter than that by having the rail down right.
Q. The object is to guard what part?
A. To guard the flange of the wheel, to keep it inside of the——
Q. Which particular part must be particularly given attention to?
A. Right across the point.
Q. That is where it is particular that it should be right?
A. Yes.
Col. SELTZER: The longer the rail the better, isn't it, at a curve?
A. Not always.
Q. Did you say twelve feet would be too short?
Mr. SHIRK: He didn't say that.
A. It would be rather short I suppose.

51 CHARLES HAVARD, a witness called for the defendant, having been first duly affirmed, testified as follows:

Direct examination by Mr. SHIRK:

Q. Where are you employed?
A. By the Cornwall railroad.
Q. In what capacity?
A. Train-despatcher.
Q. Were you at the scene of the accident at which Miller was hurt, and, if so, how soon thereafter?
A. About three-quarters of an hour afterwards.
Q. How did you find the track and the frog at that point?
A. The frog was all right, it was in good condition, about twenty feet the other side, south of that, it was torn up of course, but the frog was all right, in good condition, but about twenty to twenty-five — south of that it was torn up on account of the cars being off the track.
Q. What was done there at the time? Was it guaged at the time?
A. Yes.
Q. Were you present?
A. I don't know about the guaging. We simply measured the distance that the guard-rail was off the main rail, Mr. Neff and I.
Q. How was that?
A. About two inches, not more than two inches away.
Q. What was the condition of the frog?
A. Good.
Q. What was the condition of the road-bed and sills at the frog or near it?
A. We considered it good.
Q. Do you know when the next train ran over it?
A. I know that we pulled those cars back over that frog in an

opposite direction—the cars that were not wrecked, that were in that train but were not wrecked.

Q. Over this very frog?

A. Yes.

Q. You say the guard-rail was about two inches from the main rail?

A. Yes.

Q. How was the train made up that day?

A. There were five stone cars next to the engine, then twelve coke cars, and three Donaghmore empty ore cars, and eleven North Lebanon empty ore cars.

Q. Which was the first car to jump the track?

A. The last coke car, right ahead of the ore cars.

Q. How many North Lebanon cars were derailed?

A. I think two or three, I am not certain. The trucks were knocked out from under them on account of the trucks of the cars ahead getting off the track, and they coming up in contact with them, knocked them out.

Q. What was done with the truck on the first coke car that leaped the track?

A. It was put under it again as soon as they got it out.

Q. What did they do with it then?

A. Moved it up to the Bird Coleman furnace, unloaded it, brought it down, and put it in the lower end of the yard exactly at South Cornwall station.

Q. What became of it then?

A. The next day I went with the engine and brought it in.

Q. Where did you take it to?

A. To the West Lebanon shops.

Cross-examination by Col. SELTZER:

Q. You say you have a car-inspector? Did he inspect these?

A. Yes.

52 Q. How do you know he did?

A. That is what he was there for.

Q. Did you see him do it?

A. You can call him up and ask him. I didn't stand there and watch every car.

Q. You only say what you think is so—the sills were taken out afterwards, weren't they?

A. I don't know anything about that.

Q. How do you know the number of cars that were there?

A. I know exactly what I ordered out in the train, and what was at one time in the train by the report of the conductor made to me.

Q. You only know it from the report?

A. Yes, I saw that too, the night before.

Q. Did you see the wreck?

A. I did.

Q. Did you say the frog was all right? When the accident occurred?

A. I did, I considered it so.
Q. Didn't you say to Lewis Miller that you thought the frog was not all right, or laid properly?
A. I made no expression to anybody except to Mr. Neff, that I remember of.
Q. Didn't you say in the Cornwall depot that the frog was the cause of the accident?
A. No, I didn't see Louis Miller in there with the exception of about a minute when he opened the door and came in.
Q. Didn't you say that in the presence of Louis Miller that the frog was the cause of the accident?
A. No, sir.
Q. Your business is not to see whether frogs are in proper condition, though, is it?
A. No, sir, not particular.

Mr. SHIRK, addressing the witness Dewalt, who had left the stand:

Q. Mr. Dewalt, how far was this guard-rail from the left-hand track?
A. About two inches and a quarter.
Q. Is that the usual distance?
A. About two inches, yes, sir.
Q. Would two and one-eighth inches be an improper distance?
A. About two inches, we didn't usually allow them any wider.

Mr. SHIRK, addressing the witness Zeller, who had left the stand:

Q. Mr. Zeller, what do you regard as the proper distance for a guard-rail to be from the track?
A. Two inches is sufficient if it is fixed right.
Q. Two inches up to what distance?
A. If the guage was a little wider, two and a quarter would be sufficient.

BEN. CRAIG, a witness called for the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. SHIRK:

Q. Mr. Craig, where are you employed?
A. On the Cornwall railroad.
Q. In what capacity?
A. Firing.
Q. Do you remember the place that this accident occurred?
A. Yes.
53 Q. How soon after the accident did you run over it with trains?
A. I think we went over it in the evening, I am not positive.
Q. What day?
A. The same day; I am not positive, but I think we did; I think our last run was over it in the evening.

Q. Did you continue to run over it then? Did you continue running over that track?

A. I think we did.

Q. From your experience at what rate of speed were you running around that point at the time of the accident?

A. We were making about our running time, schedule speed, between ten and fifteen miles an hour. We were not to exceed—not over fifteen miles, I am positive of that. Our schedule was between twelve and fifteen, and we were about on time.

Q. Is that the speed allowed on other roads, on freight trains, in this neighborhood?

(Objected to.)

A. Each company has its own rules in that.

Q. Is that the usual rate of speed?

A. As a general thing you find a freight speed from twelve to fifteen miles an hour.

Cross-examination by Col. SELTZER:

Q. Do you find freight speed going around a sharp curve fifteen miles an hour?

A. Yes, provided they are able to pull the train—haven't got too much of a train.

Q. Why then did they give you an order that you should not run more than eight miles an hour after this accident?

A. O, they countermanded that order afterwards again.

Q. When?

A. Some time after they had issued it.

Q. Do you mean to say that you have run as fast around there since as you did that morning?

A. O, yes, we have went around that curve since that as fast, after they had countermanded the order.

Q. After the road-bed had been fixed, eh?

A. After they had everything fixed up again.

Redirect examination by Mr. SHIRK:

Q. You say this order was countermanded after everything was fixed up?

A. Yes, some time afterwards.

Col. SELTZER: How long afterwards?

A. I am not able to say how long afterwards.

Q. A couple of months afterwards?

A. I think so.

Q. Who countermanded the order?

A. I think Mr. Neff did himself.

Q. You think so, you don't know that?

A. I ain't positive.

Q. You didn't get the order, did you?

A. No, I ain't positive.

Q. You didn't get the order, did you?

A. No, the conductor and the engineer gets them.
Q. Where is Mr. Neff now?
A. Now, I can't tell you.
Q. He is not around here?
A. No, sir.

NELSON T. MOYER, a witness called for the defendant, having been first duly sworn, testified as follows:

54 Q. What is your business?
A. Car-inspector of the Cornwall Railroad Company.
Q. How long have you occupied that position?
A. Going onto three years.
Q. Where were you employed and in what capacity immediately before that?
A. By the P. & R. as car-inspector.
Q. Do you remember the accident?
A. I remember the accident, yes.
Q. Do you remember the last coke car on that train going out?
A. I do.
Q. Did you inspect it?
A. I did, but not the morning that it went out.
Q. Was it run at all after you inspected it?
A. Not more than right down into the yard, and remained there until the morning.
Q. How did you find it?
A. In good condition, all right.
Q. In its proper gauge, and all right?
A. I didn't gauge them there.
Q. Where did you gauge them?
A. When a car is running you can see at the wheels whether they are in order or not. If they are all right they run straight, if they are not all right, they will wobble. This car did not wobble, or else we would have gauged it there.
Q. Is that the usual method?
A. Yes, that is the usual method.

No cross-examination.

MR. SHIRK:

Q. What was the number of the car?
A. I think the car that was wrecked was 16389, or 18639, I am not sure which.

S. W. HOUSTON, a witness called for the defendant, having been first duly sworn, testified as follows:

Direct examination by MR. SHIRK:

Q. Where are you employed and in what capacity?
A. By the Cornwall Railroad Company as master mechanic.
Q. Were you at the place of the accident?
A. Yes.

Q. Did you see the coke car that was derailed there?
A. Yes, sir.
Q. Where did you see it next after the accident?
A. At the shops.
Q. Did you make a *guage* of the wheels at that time? And how did you find them?
A. I *guaged* the wheels, yes.
Q. How were they?
A. Perfect, up to the master builders' standard, what we go by.
Q. How long have you been employed on railroads?
A. About eleven years.
Q. In what capacity?
A. As a fireman, assistant traveling engineer, and master mechanic.
Q. From your experience in railroading, is it a very unusual thing for cars to be derailed, even on a perfect track?
A. No, sir.
Q. What causes cars to be derailed?
A. Unforeseen causes that no man can avoid. Cars have been known to go off the track even in perfect condition, the only cause we could give was the truck slewing and in passing over the curve they have not righted themselves, and gone off the track.
55 Q. Is there any way to prevent that?
A. No possible way imaginable.

Col. SELTZER:

Q. You didn't see how these cars went off the track, did you?
A. No, sir.

DANIEL MCCARTY, a witness called for the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. SHIRK:

Q. Mr. McCarty, you are an engineer on the Cornwall railroad?
A. Yes.
Q. And were you running a train at the time of the accident?
A. Yes, sir.
Q. What rate of speed were you running?
A. Between twelve and fifteen miles an hour.
Q. Do you regard that as a safe speed to run around that curve?
A. Yes.
Q. When did you next go over that frog after the accident?
A. I think it was the last run this way, the evening of that same day.
Q. Then you came over it, the tracks had been fixed then?
A. Yes.
Q. Has there been any accident there at that place since?
A. No, sir.

Cross-examination by Col. SELTZER:

Q. You say that's a safe way of coming around there, about fifteen miles an hour, is it?

A. Yes, sir.

Q. You didn't get around there when you went fifteen miles an hour that morning, did you?

A. I got around all right, but I couldn't help it over where the accident occurred. The biggest part of the train got around there.

Q. There was one car that didn't get around there?

A. The twelfth coke car, that was the first car that got off.

Q. Did you get an order not to run so fast?

A. Yes.

Q. What was it?

A. Eight miles an hour.

Mr. SHIRK:

Q. At that time the track was just being repaired, was it?

A. Yes, and we always got an order to that effect whenever they were doing any work on the track.

Col. SELTZER: You got that order that same day of the wreck, didn't you?

A. Yes, that order was given that same day.

Q. Mr. McCarty, that order to run eight miles an hour around the curve, has never been revoked?

A. Not as I know of, but I was laying off at the time, and it might have been; whenever the track was repaired, we got an order to reduce speed to such a rate per hour, and when the track was repaired, we always got an order to resume speed.

Q. You haven't got an order since, have you, to resume speed? It has not been rescinded since, has it?

A. I didn't get no order since.

Mr. SHIRK:

Q. Are you running on that order now, or not?

A. No, I am not; I am running at regular schedule speed.

Mr. SHIRK: I desire to offer this in evidence as a photograph of the frog, in connection with the evidence.

56 (Objected to unless it is simply to show the situation of the frog.)

By the COURT: It is simply to show the situation of the frog.

Mr. SHIRK: Yes, it is to be used for the purpose of explanation.

HARRY COX, recalled by Col. Seltzer for further examination.

Q. Was that order ever rescinded after the accident?

A. I have never received anything.

Mr. SHIRK:

Q. How are they running since?

A. At schedule speed. We always take it for granted after the track is repaired like that, that they intend for us to resume speed.
Q. You did this as in other cases?
A. Yes.
Q. All cases?
A. Yes, sir.

MICHAEL HAGGERTY, a witness called for the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Col. SELTZER:

Mr. SHIRK: I ask for an offer.

Col. SELTZER: I desire to prove that Mr. Dewalt, who sets himself up as a master mechanic, and being expert in the laying of frogs, that when he came to this road—this man being a railroader for twenty years and a section boss, that when Mr. Dewalt was putting down a frog, he didn't know how to straighten it out and fix it up.

(Objected to as irrelevant and incompetent in this issue.)

By the COURT: That is entirely too general a proposition.

Col. SELTZER: I want to show that he didn't understand the business of putting down a frog properly. He says he did. To bear upon the question that the frog was not properly in line. I want to prove that when he came to that railroad, that he put down a frog, and that this man had to go and change it, and that he didn't understand how to put it down.

By the COURT: The offer is incompetent.

(Exception by the plaintiff.)

Col. SELTZER: I desire also to prove by this witness that the rate of fifteen miles an hour around so sharp a curve, is too fast a speed from his knowledge of railroading.

(Objected to because it is a part of the plaintiff's case-in-chief.)

Testimony closed.

Col. Seltzer read plaintiff's points to the court, followed by Mr. Shirk, who read the defendant's points.

Discussion by Mr. Shirk and Col. Seltzer on the points presented to the court.

Adjourned till nine o'clock tomorrow morning.

9 A. M., WEDNESDAY, *March 9th*, 1892.

Court convened pursuant to adjournment.

Argument to the jury by respective counsel.

57 *Plaintiff's Points.*

"1. Lewis Miller, the plaintiff, was a passenger on the train when he received his injury."

"2. The act of April 4, 1868, is unconstitutional and void."

"3. The right of the plaintiff to have remedy for his injury was a well-known and clearly defined common-law right, one of the

inherent indefeasable rights guaranteed to all citizens by the constitution. The act of April 4, 1868, can therefore not be invoked by the defendant against the plaintiff. And it is not remedy by the due course of law."

If these points are refused the court is further requested to charge:

"4. If the jury believe that the train ran off the track because of the too fast driving over the frog in the curve of the road, then the defendant's negligence is made out, and the plaintiff is entitled to recover, unless he by some act, contributed to his own injury."

"5. If the jury believe that the train ran off the track partly because of the fast driving over the frog in the curve of the road, and partly because of a defect in the frog or the placing of the same, or the road-bed under it, then defendant's negligence is established, and the plaintiff is entitled to recover unless he by some act contributed to his own injury."

58 "6. If the jury find that a defect in the frog or its placing, or the road-bed under it was the cause of the train running off the track and also that the defect had been brought to the notice of S. S. Neff, the superintendent of the road, and he neglected to have it put in proper condition, then the defendants were guilty of negligence and the plaintiff is entitled to recover if he continued to travel over the road after observing the defect upon the promise of the superintendent that the same would be corrected, if from the condition of the frog it was reasonably probable that trains could be run over it safely."

"7. If the jury find that the construction of any part of the frog and guard-rail belonging to the frog or the road-bed on which the frog was laid was defective, and that either one or all of these caused or contributed to the car's running off the track, then the negligence of the defendant is made out, and the plaintiff is entitled to recover unless he, by some act, contributed to his injury."

59 *Defendant's Points.*

"1. That under the act of assembly approved April 4, 1868, the plaintiff, Lewis Miller, under the uncontradicted evidence in this case, was before and at the time of the accident engaged or employed on or about the railroad of the defendant, and in or about cars thereon, and therefore his right of action and recovery is only such as would exist if he had been an employee of the defendant."

"2. The defendant therefore did not guarantee the absolute safety of the plaintiff, and no inference of the defendant's negligence can be presumed or inferred from the mere fact of his having been injured."

"3. A servant seeking to recover for an injury is met by the presumption that the master discharged his duty to him by providing suitable instrumentalities for the business, and in keeping them in condition, and this presumption must be overcome by the plaintiff, and he must further show that negligence in this particular was the cause of the injury."

"4. If the jury find that the proximate cause of the accident to the plaintiff was the negligent and excessive fast running of the train, then being caused by a fellow-employee, he cannot recover."

"5. If the negligence of the plaintiff contributed in any degree to the injury, he cannot recover."

"6. The defendant was not bound to furnish its employees with the latest and most improved instrumentalities, but only with such as were reasonably safe, and their general use is a proper test of their safety."

"7. Under all the evidence in the case, the verdict must be for the defendant."

60 *Charge to the Jury by Judge McPherson.*

GENTLEMEN OF THE JURY: This is an action brought against the Cornwall Railroad Company for an injury done to the person of the plaintiff, and there are two questions for you to decide: First, whether the defendant has been negligent, and thereby caused the injury, and in the next place, whether the plaintiff has himself been free from negligence contributing to the injury. I just want to say a word in the begin ning with reference to the attitude in which you ought to approach this case:

As far as possible, and I assume that the jury will find it possible—they ought to discard from their minds whatever prejudice, if any, may exist, toward the defendant. There is nothing brings so much discredit upon courts of justice as this continual harping upon the character of corporations defendant, particularly in this class of cases. It tends to make people believe there is no justice for a corporation when injury has been caused by alleged negligence. It has become almost universally understood that if the plaintiff alleges that he has been injured, he is sure to get a verdict, if the defendant be a corporation. I say that tends to bring discredit on trials in courts of justice. It is essential in a society which is built upon reference for law, upon respect for law, that this should not be so. It tends to throw discredit upon the administration of justice that such a belief should exist.

61 Everybody stands on an equality before the law, or ought to stand on an equality before the law, and ought to stand upon the same footing in a court of justice; and if any such feeling or prejudice has had any effect upon your minds, it is your solemn duty to discard it and try this case justly upon the evidence, as all other cases are tried.

Now so far as the plaintiff is concerned, although he is not an employee of the Cornwall Railroad Company, he is in this case to be treated as if he were an employee of the Cornwall Railroad Company. An act was passed in '68 providing that when any person is employed upon a railroad, he shall be treated as if he were an employee on that railroad, and the uncontradicted evidence here shows that the plaintiff, Lewis Miller, is in that position, and therefore we instruct you that he is to be treated as if he were an employee of the Cornwall Railroad Company.

There is another matter also which may be left out of the case at the beginning. If you should find that this accident was entirely caused by the fast running—the too fast running of the train around this curve; if, in other words, the engineer was negligent in running the engine at too high a rate of speed around this curve, then we instruct you also that the plaintiff cannot recover, because in that case the engineer would be his fellow-servant upon the train, and it is the law, until the legislature changes it at least, that one fellow-servant cannot recover as against his employer for the negligence of another fellow-servant. He has a remedy, and it is against the person who has injured him. If the engineer in the case supposed ran negligently around this curve and thereby caused Lewis Miller injury, the latter could sue the engineer but would have no right of action against the railroad company. I speak of that in case the injury was entirely due to the negligence of the engineer in running too fast; because if it was caused in part by the negligence of the engineer in running too fast, and in part by the negligence of the railroad company in constructing and maintaining this frog, then the defendant might be responsible.

62 Now, therefore, those matters being out of the case, the first question for the jury to consider is the second one which I referred to in the beginning, and which comes naturally first, and that is, Was the plaintiff himself guilty of any contributory negligence? Was he himself careless? And did his carelessness contribute to his accident? Because the law in Pennsylvania is—and almost universally elsewhere—that if he was himself careless, and thereby helped to cause his own injury, he cannot recover; and that is so if he was careless, and in any degree contributed to cause his own injury. If he was negligent and the defendant was negligent also, he nevertheless has no right of action. We do not attempt to measure and decide whether one was more careless than the other. The first question for you to decide is whether Lewis Miller was careless, and that depends upon what the jury may find to have been the condition of things at this frog, and upon the knowledge that Lewis Miller had of that condition.

You remember his testimony upon the subject. I do not intend, I may say here, to go over all the testimony in the case, but simply to give you instructions by which to consider it.

You remember Lewis Miller's testimony in regard to the condition of the frog. He says that shortly before the accident he went over this place and noticed a jolt, and notified the superintendent that something was wrong, and received the superintendent's promise that it would be fixed. He says that the guard-rail was out of place about four inches, so that he could put his hand in so, (indicating.) I think that was the expression he used. You know what the guard-rail is. It is a rail fastened opposite the point of the frog, and its purpose is, as the cars begin to swing around that curve, to prevent the wheels upon the other track from going too far over, and thereby throwing off the other wheel upon the other track—the switch track. If it was not for the guard-rail,

63 you can see that as the cars swing around that curve, they

would be carried over in this way, and there would be almost inevitably an accident, unless this guard-rail held the wheel upon the left-hand track in place. Of course if it is too far away from the track, there might as well be none there at all, and the jury must consider under all the evidence what was the condition of things there, and what was Lewis Miller's knowledge of that condition; because the law upon that subject is—upon the subject of danger of that kind, as I find it in one of our cases, as follows: That "while it is the duty of the master or employer to furnish suitable instrumentalities to the servant by which he may perform his work, the servant however is required to exercise ordinary prudence, and if the instrumentality by which he is required to perform his service is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master or employer cannot be held liable for the resulting damage in such case, because the law adjudges the servant to be guilty of concurrent negligence, and would refuse him that aid to which he would be otherwise entitled. If the defect was so great that with the use of the utmost skill and care the danger was imminent, so much so that no one but a reckless man would incur it, the employer would not be liable."

Now that is the test to apply in this case: Was the condition of this frog to Lewis Miller's knowledge, so obviously, so plainly and immediately dangerous, that an ordinarily prudent man would not have ventured to ride over that place? If it was so, then he has no right to recover; it would be negligence on his part to do it and it would be no answer to say that he was ordered to do it. A man is not bound to risk his life and to risk accident simply because he is ordered to do it, if the danger is so obvious and so imminent that obedience to an order of that kind would probably, or almost
64 certainly, bring injury to himself. If he proceeds, he proceeds at his own risk. A man owes some care to himself, and if he does not take it, he can have no right of recovery. That is a question for the jury to consider here. What was the condition of things at this frog? Was it so plainly and immediately dangerous that a man of ordinary prudence would refuse to ride over it on this train? If it was so, then if Lewis Miller was injured in consequence of going over it, knowing the condition of things there, he could not recover in this case.

Upon the other hand, if the condition of things there, although not entirely satisfactory, although indeed dangerous to a certain degree, was not so plainly and immediately dangerous that an ordinarily prudent man would refuse to go over it in a train such as this was, then the plaintiff might not be negligent.

As the same case expresses it, "Where the servant, in obedience to the requirement of the master incurs the risk of machinery, which though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary precaution or skill, the rule is different." And I take it the same rule applies where, even although the master does not require the servant to perform the duty, the servant does perform the duty without being actually and specially required to do

it,—I take it the rule is the same; that there also he may incur the risk of the machinery, "which though dangerous, is not so much so, as to threaten immediate injury, or where it is reasonably probable that it may be safely used by the exercise of extraordinary caution or skill." So these are the tests to apply to the questions whether the plaintiff was guilty of contributory negligence in this case or not.

If you find that he was guilty of contributory negligence
65 with his knowledge of the condition of things there, in going over this frog in this train of cars, then he cannot recover. If you find, however, that he was not guilty of negligence in going over this frog in this train of cars, then you come to the next question in the case, the question whether the defendant was negligent.

Because it is not sufficient simply to show that the plaintiff was injured, and it is not sufficient to show that the plaintiff was injured without any fault of his own. It is his duty to go further and to show to your satisfaction by the fair weight of the evidence, that the hurt of which he complains was inflicted by the negligence of the defendant.

In the case of a person injured as a passenger, through some defect in the road-bed or in the means of transportation, the law presumes that the carrier was negligent, and all the passenger need do is to show that he was hurt while riding in the train. It is then the duty of the carrier to show that he was not negligent, and to show that the injury was caused by some inevitable accident, or by some cause for which he was not responsible. But where the suit is brought by an employee against his employer, the rule is different for reasons of policy. It is necessary for the employee to show—to prove affirmatively—that the employer was negligent, that in some respect he failed in his duty, was careless and therefore occasioned the accident complained of.

In other words, if Lewis Miller here was not careless himself; if the injury of which he complains was caused by an accident, then the defendant company would not be responsible, although the cars did run off at this frog, and thereby cause this injury. If that running off was not due to any negligence of the defendant, but
66 due to an accident such as some of the witnesses described, such as too stiff a truck causing the car to mount up and ride over this frog, then the defendant could not be held responsible. It cannot be held for an accident such as I have described, as an illustration, simply because the plaintiff was hurt. While in that case we would feel a personal sympathy for the plaintiff and deplore the accident from which he has suffered, it would obviously be the grossest injustice to make the defendant pay for something for which it was not at all responsible.

So that we come to the question whether the injury was caused by the defendant's negligence. How it was directly caused of course is plain. The cars went off the track, some of them, and the plaintiff was thrown off and was injured—being thrown off, his leg was broken near the ankle.

Now the plaintiff asserts that the accident was caused by the

negligence of the railroad company in reference to this frog. The plaintiff asserts that the frog was out of line, was not in proper place. He asserts also that the guard-rail was too far from the other rail, so that it did not sufficiently keep the cars on the track, as they went around this curve—on the main track as they went around this curve; and he asserts also that some of the ties under this frog were not sound, were so unsound that the frog was in bad condition, and that its surroundings were defective. He also asserts that the injury was caused in part by the too rapid running around this curve, but we instruct you, if it was solely caused by that, the plaintiff has no case. If, however, it was caused in part by the too rapid running around the curve, and also in part by some defect of the frog and its surroundings due to the negligence of the defendant then there might be a recovery.

Now there is this test—the law has laid down this test, in
67 regard to the maintenance of a track and road-bed. It is the same test which is applied to machinery generally, furnished by a master to his employee. It is not the duty of a master to furnish to his employee perfect machinery, perfect instrumentalities. There is not, and there never was any such rule. It would be an entirely impracticable rule, and there never was, and there is not now, any such rule. The rule is not that perfect instrumentalities must be furnished to the employee, but that those which are reasonably safe and reasonably suitable for the purpose intended shall be furnished. That is the only sensible rule, and that is the rule which has been adopted by the law generally, and a good test of the suitableness and safety of machinery or instrumentalities is their general and ordinary use.

There is no question about the character of this frog as to whether or not it was a suitable frog in its construction. That question is not raised, and it is not asserted that this was an unsuitable frog in its construction; but that it was improperly put down is the point that is raised by the plaintiff.

Now the same test applies to the construction of the road-bed and to its maintenance that applies to the character of the machinery furnished: that is, it is the duty of the company to furnish to its employees who run over the road, a road-bed that is suitable, a road-bed that is in fair and reasonably good order for the passage of trains. The company is not obliged to furnish a perfect road-bed. It would be out of the question to do it and no such duty is required of it, and that is the test that the jury must apply. You see the importance of applying this test for this reason: That the injury, or the accident, might be occasioned by a defect, even by a slight defect in the road-bed or in the track, and yet, if upon a fair consideration of all the evidence the jury should come to the conclusion that the road-bed, or the particular appliance, was in fair and reasonably good order, that it was suitable for the purpose for
which it was intended—in such case as that, even though
68 the accident was caused by a slight defect, there could be no recovery. The company is not an insurer of the safety of employees passing over its road. It does not owe them that duty,

and the test to be applied, I repeat, is: Was the road-bed in fair and reasonably good order for the passage of trains? Was it a suitable instrumentality for the purpose for which it was intended? And not, was it in perfect condition.

Now that is the test to be applied, and to be applied of course as of the time when this accident took place. There is some evidence in regard to the condition of the frog at present. That, of course, is competent so far as the character of the frog is concerned. It is testified that it is in good order at present and therefore the jury might fairly infer that it was in good order at that time, but obviously, these witnesses know nothing at all about how the frog was laid in the track at the time of the accident. They don't pretend to speak about that, and their testimony don't bear upon that subject. It only bears upon the material of which the frog was made, and the manner in which the frog was constructed, not the way in which the frog was actually put in the track; and so also in regard to the guard-rail. Those matters—the position of the frog in the track, the position of the guard-rail and the condition of the ties under the frog—are essential matters urged by the plaintiff, and those the jury must consider as of the time when the accident took place, considering all the evidence that bears upon that point.

Now taking it altogether, what was the condition of these matters at that time? Was the frog in the proper place in the track? Was the guard-rail so placed as to be a fair and reasonable protection? Were the ties in fair and reasonably good order? Were this whole frog and its surroundings in fair and reasonably good order for the passage of trains, so that it was a suitable instrumentality for the purpose for which it was intended? If it was, there can be
69 no recovery in this case. If it was not—if it was negligently maintained, if it was carelessly kept—if it was carelessly kept out of line, if the guard-rail was so carelessly maintained at such a distance from the other rail that it was not a reasonably safe protection; and so in regard to the ties, if they were not in reasonably good condition to fulfill their purpose in the road-bed, the jury would be justified in finding that the defendant was negligent; and I must ask you to be careful in considering these matters.

Then if the jury find negligence on the part of the defendant, they must go a step further, and ask themselves whether the negligence caused the injury; because I repeat what I said a few moments ago,—if the plaintiff's injury was caused by an accident, and in spite of the condition, which may have been a negligently defective condition, of the frog—if it was caused by an accident, the defendant would not be responsible. If, as has been suggested, it was caused by the stiffness of one of the trucks which caused the car upon it to mount the frog, and thereby threw the other cars off behind it and thus inflicted the injury, the defendant would not be responsible for that unless the condition of the frog and its surroundings contributed to the injury.

In other words, if there was an accident there, it would be necessary that the defendant's negligence should unite with that accident in causing the injury complained of before the defendant would be

responsible, and if the injury was caused simply by an accident without the defendant being negligent at all, or in such a way that the defendant did not help to cause the plaintiff's injury, there could be no recovery in the case.

Now those are the questions for the jury to decide, and I will just briefly state what they are: First, the plaintiff is to be considered as an employee. That we instruct you, and it is your duty to accept that instruction from the court. Next, we instruct you that if the accident was entirely caused by the negligence of the
70 engineer by fast running around the curve, then the plaintiff cannot recover. These two instructions it is your duty to accept from the court.

If you decide that it was not due simply to the negligent fast running around that curve by the engineer, then you come to the question whether the plaintiff himself was negligent and thereby contributed to his injury; and that depends, as I have already said to you, upon what the condition of things was there at the time, and what it was to the plaintiff's knowledge, depending largely upon his own testimony upon that subject. If he was negligent, if this danger was plain and obvious, and nevertheless he took the risk, then he cannot recover. If he was not negligent, however, then you come to the question whether the defendant was negligent in the maintenance—construction and maintenance—of this frog at that time. If it was negligent in so doing, and its negligence contributed to this accident, if it caused it in whole or in part, the plaintiff may recover. If it did not, the plaintiff has no case.

In case you find in favor of the plaintiff, the question of damages arises, and a few words upon that subject will conclude what I have to say. The plaintiff is entitled, in case of recovery, to whatever sum he has paid out or owes for medical expenses. He is entitled to a fair compensation for the loss of time due to his injury. He is also entitled to be compensated for the pain and suffering, both bodily and mental, which he has suffered by reason of this accident in the past, and for what he is likely to suffer in the future. That is a rather difficult subject for the jury to decide, but it is one which the jury must approach and consider carefully and prudently, and without extravagance. The jury must not undertake to decide how much they would take to undergo this pain. We cannot give them any positive instructions upon the subject, nor can any one. It is due to the plaintiff, in case he is entitled to recover at all, and it is to be fairly and dispassionately considered. Then he is also
71 entitled to recover,—for this appears to be a permanent injury—for whatever permanent loss of earning power he may have sustained. A man's ability to earn is determined in most cases by what he does earn, and if his injury has diminished his power to earn, that is a loss for which he is entitled to be made whole.

In considering and determining that question, the jury must consider the age of the plaintiff, they must consider the condition of his health, the probable length of his life, and his disposition to labor, and whatever other matters probably bear upon it. If he has

suffered, I repeat, a permanent loss of power to earn,—earning power, then he would be entitled to be made whole on that ground, and all these other matters are circumstances which help the jury to decide that question: How old he is; what is his disposition to work; how much does he now earn, or did he earn before the accident; what is his condition of health; how long is he likely to live? You see all these matters bear upon the question, and must be considered in deciding it, and the reason why it is necessary to consider them all, is that in a controversy of this sort, the future is taken into consideration as well as the past, in order that the question may be settled once for all. Whatever allowance is made in favor of the plaintiff is intended to be a complete settlement of his claim.

Those are the questions for the jury to decide. In case you find in favor of the defendant, you simply say in favor of the defendant. If you find in favor of the plaintiff, you find the sum which you decide to be the fair and reasonable measure of damages, under the instructions which I have given you on the subject.

We reserve the question as to whether there is any evidence of the defendant's negligence to go to the jury.

The first three points of the plaintiff are refused, and I need not read them. The fourth asks us to say:

72 "4. If the jury believe that the train ran off the track because of the too fast driving over the frog in the curve of the road, then the defendant's negligence is made out, and the plaintiff is entitled to recover, unless he by some act, contributed to his own injury."

Ans. This is refused.

If the fast running was the sole cause of the injury, the plaintiff cannot recover, as I have said to you, because the engineer was his fellow-servant.

"5. If the jury believe that the train ran off the track partly because of the fast driving over the frog in the curve of the road, and partly because of a defect in the frog or the placing of the same, or the road-bed under it, then defendant's negligence is established, and the plaintiff is entitled to recover unless he by some act contributed to his own injury."

Refused.

If the train was derailed partly because of a defect in the frog or in the placing of the same or in the road-bed under it, the jury must still consider and decide whether in spite of the supposed defects or of either of them, the frog and the road-bed were suitable instrumentalities in fair and reasonably good order for the passage of trains. If they were in such order there can be no recovery; if they were not, a recovery may be had.

"6. If the jury find that a defect in the frog or its placing, or the road-bed under it was the cause of the train running off the track and also that the defect had been brought to the notice of S. S. Neff, the superintendent of the road, and he neglected to have it put in proper condition, then the defendants were guilty of negligence and the plaintiff is entitled to recover if he continued to travel over the road after observing the defect upon the promise of the super-

intendent that the same would be corrected, if from the condition of the frog it was reasonably probable that trains could be run over it safely." (76 Pa., 389.)

73 As a whole that point is refused for the same reason. Part of that point is probably correct, but I will not divide it. As a whole it is refused.

"7. If the jury find that the construction of any part of the frog and guard-rail belonging to the frog or the road-bed on which the frog was laid was defective, and that either one or all of these caused or contributed to the car's running off the track, then the negligence of the defendant is made out, and the plaintiff is entitled to recover unless he, by some act, contributed to his injury."

This is refused for the same reason.

Defendant's Points.

The defendant requests the court to instruct you as follows:

"1. That under the act of assembly approved April 4, 1868, the plaintiff, Lewis Miller, under the uncontradicted evidence in this case, was before and at the time of the accident engaged or employed on or about the railroad of the defendant, and in or about cars thereon, and therefore his right of action and recovery is only such as would exist if he had been an employee of the defendant."

This is affirmed.

"2. The defendant therefore did not guarantee the absolute safety of the plaintiff, and no inference of the defendant's negligence can be presumed or inferred from the mere fact of his having been injured."

This is affirmed.

"3. A servant seeking to recover for an injury is met by the presumption that the master discharged his duty to him by providing suitable instrumentalities for the business, and in keeping them in condition, and this presumption must be overcome by the plaintiff, and he must further show that negligence in this particular was the cause of the injury."

This is affirmed.

74 "4. If the jury find that the proximate cause of the accident to the plaintiff was the negligent and excessive fast running of the train, then being caused by a fellow-employee, he cannot recover."

This is affirmed if the negligent fast running was the sole cause of the injury, but if the injury was caused in part by such running, and in part by the defendant's construction or care of its tracks or road-bed, the plaintiff may recover.

"5. If the negligence of the plaintiff contributed in any degree to the injury, he cannot recover."

This is affirmed.

"6. The defendant was not bound to furnish its employees with the latest and most improved instrumentalities, but only with such as were reasonably safe, and their general use is a proper test of their safety."

This is affirmed.

"7. Under all the evidence in the case, the verdict must be for the defendant."

The seventh point is refused and reserved.

The jury retired in charge of an officer.

Exception to the charge, and to the court's answers to defendant's points, and to the refusal of the court to give all of defendant's points by the defendant.

Exception to the charge of the court by the plaintiff, also to the answers to the plaintiff's points by the court, and to the refusal of the court to instruct the jury as requested by the plaintiff in the points refused by the court.

JOHN B. McPHERSON, *A. L. J.* [SEAL.]

Verdict for plaintiff for the sum of nine hundred dollars, ($900.)

75 *Motion for Judgment on Point Reserved Non Obstante Veredicto.*

LEWIS MILLER
v.
THE CORNWALL RAILROAD COMPANY. } In the Court of Common Pleas of Lebanon County, June Term, 1891. No. 56.

And now, March 12, 1892, the defendant, by its attorney, Howard C. Shirk, moves the court for judgment in *the* favor upon the point reserved *non obstante veredicto.*

HOWARD C. SHIRK,
Att'y for Def't.

Endorsement: 56. June term, 1891. Lewis Miller *vs.* The Cornwall Railroad Company. Motion for judgment on point reserved *non obstante veredicto.* Filed March 12, 1892. Howard C. Shirk, att'y for def't.

Verdict.

LEWIS MILLER
v.
CORNWALL RAILROAD CO. } In the Court of Common Pleas of Lebanon County, June Term, 1891. No. 56.

And now, to wit, Lebanon, Pa., Mar. 9, 1892, we, the jurors empannelled in the above case, find a verdict in favor of the plaintiff for doctor's bill and lost time, four hundred dollars ($400), and for pain and suffering, five hundred dollars ($500); total, nine hundred dollars ($900).

JACOB GROH, *Foreman.*

Endorsement: No. 56. June T., 1891. Lewis Miller *v.* Cornwall R. R. Co. Verdict. Filed March 9, 1892.

76 LEWIS MILLER
v.
CORNWALL RAILROAD COMPANY. } No 56. Leb. C. P., June Term, 1891. Motion for New Trial and for Judgment on Reserved Point.

Opinion and Judgment for Defendant Non Obstante Veredicto.

By the COURT:

It is quite clear that the plaintiff's case depended entirely upon the position of the guard-rail at the time of the accident. If at that time there was a space of four inches between this rail and the east rail of the main track, the construction was faulty as all the witnesses agreed who were examined on this matter, and the jury would have been justified in finding that the company was negligent and that this negligence was the cause of the injury. But the difficulty is that the plaintiff, who is the only witness on this vital point, does not profess to describe the position of the rail on Oct. 16, the day of the accident, but as it was "a few days" (p. 13) or "several days" (p. 16) or "a couple of days" (p. 41) before that time; while the testimony of defendant's witnesses is positive and uncontradicted that on either Oct. 14 or 15 a new frog was put in and that the guard-rail was then in proper position. There is no real opposition in the testimony. The plaintiff and his witnesses describe certain defects existing several days before Oct. 16; the defendant's witnesses testify that if these defects existed they had been remedied on Oct. 14 or 15; and then follows the accident, apparently due either to excessive speed around the curve for which as the negligence of a fellow-employee the present action
77 could not be sustained, or due perhaps to some unexplained cause such as the failure of a truck to adjust itself to the curve, but certainly not shown to be due to any negligence of the defendant.

It is not necessary to cite authorities in support of the proposition that an employee (and the plaintiff is in this position by force of the act of 1868, P. L. 58) must affirmatively prove the employer's negligence as the cause of his own injury before he may recover. This was the plaintiff's duty, and in our opinion he has failed. After a careful study of the testimony we do not find any evidence that would justify us in supporting the verdict, or justified us in submitting the question of defendant's negligence at the trial. The plaintiff's injury is greatly to be deplored, but it seems to have resulted from one of the risks of his employment or from the negligence of a fellow-employee, and not to be chargeable to the defendant's negligence. If we are wrong it is a satisfaction to know that the record is in such a shape that the mistake can be easily corrected and without another trial.

A new trial is refused, but judgment is directed for the defendant on the reserved point notwithstanding the verdict.

(Exception to plaintiff.)

JOHN B. McPHERSON, *A. L. J.* [SEAL.]

Endorsement: "No. 56. June T., 1891. Lewis Miller *v.* Cornwall R. R. Co. Motion for new trial & for judgment. Opinion. Filed July 20, 1892."

78 *Plaintiff's Statement of Demand.*

Lewis Miller, the plaintiff in this case, by A. Frank Seltzer and B. Morris Strouse, his attorneys, complains and says that The Cornwall Railroad Company, the defendants in this case, before and at the time of committing the grievances hereinafter mentioned, were a railroad corporation, and as such were the owners of a certain railroad extending through the county of Lebanon aforesaid, and were in possession, use and occupancy of the same; and were the owners also of a certain locomotive engine and trains of cars running over and upon the said railroad for the convenience of goods and passengers.

The plaintiff also states that they, the defendants, had contracted with the Lebanon furnaces to run the cars of the said Lebanon furnaces safely from the said Lebanon furnaces to the ore hills of the Cornwall Iron Company, Limited, in Cornwall township, and when loaded by them with ore back again to the North Lebanon furnaces, and to safely carry on the said cars a man to be by them, the said Lebanon furnaces, employed to go out on the said cars to superintend the loading of the said cars at the ore hills and when loaded to carry him back again to the Lebanon furnaces.

And the plaintiff further states that before and at the time of the committing of the grievances hereinafter mentioned, he was employed by the Lebanon furnaces to go out with the cars to the ore hills and come back on the same to the Lebanon furnaces.

And the plaintiff avers that the said defendants, being so engaged and having so as aforesaid contracted with the Lebanon furnaces, it then and there became and was their duty to keep the said line of railroad in good order and repair and safely constructed and to carefully and safely run the said cars of the Lebanon furnaces to and from the ore hills, and to safely carry the said Lewis Miller, plaintiff, thereon to and from the ore hills.

And the plaintiff further avers that the said defendants not regarding their duty in the premises on, to wit: the 16th day of October, 1890, did not, at a point about 100 yards southward from Cornwall station, in a sharp curve of their line of railroad and at a frog where a siding leads off from the main track to a warehouse, have their line of railroad in good order and repair and safely constructed, but had negligently and carelessly permitted said frog
79 used in switching on said siding from the main track by reason of constant use and wear and by reason of -proper construction, repair and attention thereto, to become and be so out of repair and unfit for use that the same became and was unsafe and dangerous to trains of cars passing on the tracks with which the siding connected.

And the plaintiff also avers that the said defendants further not regarding their duty in the premises on the said 16th day of Octo-

ber, 1890, by their servants and employees did so negligently, carelessly and with such excessive speed run their train of freight cars, to which the cars of the Lebanon furnaces *was* attached and on which the plaintiff was being carried by them, over their tracks and frogs aforesaid, that by reason of such negligent, careless and excessive fast driving over said frog and by reason of the said frog being so defectively constructed, out of repair and worn out, the train of cars ran off the track and the cars of the Lebanon furnaces were wrecked and the said plaintiff, who was on the cars, was caught in the wreck and violently thrown about and had his foot and ankle crushed and was otherwise bruised and injured; and thereby he, the plaintiff, then and there became and was sick, sore and disordered, and still is sick, sore and disordered, during all of which time he, the plaintiff, thereby suffered and underwent great pain and was thereby then and there hindered and prevented from performing and transacting his lawful affairs and business by him during that time to be performed and transacted; and also by means of the premises he, the plaintiff, was thereby then and there put to great expense, cost and charges, in the whole amounting to one thousand dollars, in and about endeavoring to be cured of the said wounds and sickness and disorder so occasioned as aforesaid, and hath been and is by means of the premises otherwise greatly injured and damnified, to wit, at the county aforesaid on the day and year aforesaid, to the damage of the plaintiff of ten thousand dollars. And therefore we bring suit, &c.

A. FRANK SELTZER,
B. MORRIS STROUSE,
Attorneys for Plaintiff.

Endorsement: No. 56. June term, 1891. Lewis Miller *vs.* The Cornwall Railroad Co. Plaintiff's statement of demand. Filed Aug. 26, 1891. A. Frank Seltzer and B. Morris Strouse, att'ys for plaintiff.

80 *Amendment to Plaintiff's Statement of Demand.*

Lewis Miller, the plaintiff in the case, by A. Frank Seltzer and B. Morris Strouse, his attorneys, moves to amend his statement by the addition of the following, namely: That it became and was the duty of the defendants when they ran their train of cars from Lebanon furnaces to the ore hills of the Cornwall Iron Company, Limited, and when they ran the cars of the Lebanon furnaces to the ore hills of the Cornwall Iron Company, Limited, on which they carried Lewis Miller, the servant of the Lebanon furnaces, to provide a sufficient number of pe-sons to safely run said train of cars.

And the plaintiff avers that the defendants, not regarding their duty in the premises in this particular on, to wit: the sixteenth day of October, 1890, while running their train of freight cars, to which the cars of the Lebanon furnaces were attached and on which the plaintiff was carried, did not employ and provide a sufficient number of

servants and brakemen, but ran said train with less than a full crew, the hind brakeman being absent. And that the negligence of the said company, defendant, in this regard contributed to and was a cause that led to the injury of the said plaintiff.

A. FRANK SELTZER,
B. MORRIS STROUSE,
Attorneys for Plaintiff.

Endorsement: No. 56. June term, 1891. Lewis Miller *vs.* The Cornwall Railroad Co. Motion to amend plaintiff's statement. Jan. 13, '91. Amendment allowed. John B. McPherson, A. L. J. Filed Jan'y 13, 1892. A. Frank Seltzer & B. Morris Strouse, att'ys for pl'ff.

81 *Summons.*

[L. S.] The Commonwealth of Pennsylvania to the sheriff of said county, Greeting:

We command you that you summon Cornwall Railroad Company, so that it be and appear before our court of common pleas, to be holden at Lebanon, in and for said county, on the 13th day of April next (being the 2nd Monday of said month), to answer Lewis Miller in an action of trespass; and have you then and there this writ.

Witness the Honorable John W. Simonton, president judge of our said court, this 24th day of March, in the year of our Lord one thousand eight hundred and ninety-one.

WM. GERBERICH,
Prothonotary,
Per W. H. HOSTETTER, *Deputy.*

M'ch 25, 1891.—I hereby accept service of the within writ.

HOWARD C. SHIRK,
Att'y for Def't.

March 25, 1891.—Service of the within writ accepted by Howard C. Shirk, Esq., att'y for def't, as per above endorsement.

So answers—

THOS. V. MILLER, *Sh'ff,*
Per M. H. BOWMAN, *Dep'ty.*

Endorsement: No. 56. June T., 1891. Lewis Miller *v.* Cornwall Railroad Company. Summons. Sheriff Miller, $1.25. Seltzer, pl'ff's att'y.

82 *Plaintiff's Præcipe.*

LEWIS MILLER
vs.
CORNWALL RAILROAD CO. } In the Court of Common Pleas of Lebanon County, June Term, 1891.

Issue summons in an action of trespass, returnable to the thirteenth day of April, 1891.

A. FRANK SELTZER &
B. MORRIS STROUSE,
Att'ys for Plaintiff.

To William Gerberich, Esq., prothonotary.

Lebanon, March 24, 1891.

Endorsement: No. 56. June term, 1891. Lewis Miller *v.* Cornwall Railroad Company. Pl'ff's præcipe. Filed March 24, 1891. A. Frank Sletzer and B. Morris Strouse, attorneys.

83 STATE OF PENNSYLVANIA, } *ss:*
County of Lebanon, }

[L. S.]

I, B. F. Hean, prothonotary of the court of common pleas for the county of Lebanon, in said State, do hereby certify that the above and foregoing pages contain a true copy and correct transcript of the docket entries which, with the pages hereunto annexed, form the whole record in the foregoing suit, except pl'ff's points, def't's points, & answers to def't's points.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Lebanon, this second day of February, A. D. 1893.

[L. S.]

B. F. HEAN,
Prothonotary.

84 *Writ of Certiorari.*

EASTERN DISTRICT OF PENNSYLVANIA, } *ss:*
City and County of Philadelphia, }

[L. S.] The Commonwealth of Pennsylvania to the justices of the court of common pleas No. — for the county of Lebanon, Greeting:

We, being willing for certain causes to be certified of the matter of the appeal of Lewis Miller from the judgment in No. 56 of June term, 1891, wherein the said appellant was plaintiff and Cornwall Railroad Company was defendant, before you or some of you depending, do command you that the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court of Pennsylvania, at a supreme court to be holden at Philadelphia, in and for the eastern district, the second Monday

of February next, being the 6th Monday following the first Monday of January, 1893, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable Edward M. Paxson, doctor of laws, chief justice of our said supreme court, at Philadelphia, the seventeenth day of January, in the year of our Lord one thousand eight hundred and ninety-three.

CHAS. S. GREENE,
Prothonotary.

85 Endorsement: 56. June term, 1891. C. P. Lebanon. No. 275. January term, 1893. Supreme court. Lewis Miller, appellant, *vs.* Cornwall Railroad Company. Certiorari to the court of common pleas No. — for the county of Lebanon. Returnable the second Monday of February, 1893. Rule on the appellee to appear and plead on the return day of the writ. Filed Jan'y 18, 1893. Filed Feb. 13, 1893, in supreme court. A. Frank Seltzer, B. Morris Strouse.

I certify that —— —— are surety in the within case in the sum of — dollars.

—— ——,
Prothonotary.

Jan. 18th, '93.—Service of the writ accepted with same effect as if served on the Cornwall R. R. Co. this day.

HOWARD C. SHIRK,
Att'y for Cornwall R. R. Co.

To the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the eastern district:

The record and process and all things touchi ng the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

JOHN B. McPHERSON, *A. L. J.* [L. S.]
ADOLPHUS REINOEHL. [L. S.]

86 *Remittitur.*

EASTERN DISTRICT OF PENNSYLVANIA, *set:*

[L. S.] The Commonwealth of Pennsylvania to the justices of the common pleas court for the county of Lebanon, Greeting:

Whereas by virtue of our writ of certiorari from our supreme court of Pennsylvania for the eastern district, returnable in the same court on the second Monday of February, in the year of our Lord one thousand eight hundred and ninety-three, a record was brought into the same court upon appeal by Lewis Miller from

your judgment made in the matter of No. 56, June term, 1891, wherein the said appellant was plaintiff and Cornwall Railroad Company was defendant;

And it was so proceeded in our said supreme court that the following decree was made, to wit:

Judgment affirmed.

And the record and proceedings thereupon and all things concerning the same were (agreeably to the directions of the act of assembly in such cases made and provided) ordered by the said supreme court to be remitted to the court of common pleas for the county of Lebanon aforesaid, as well for execution or otherwise as to justice shall appertain: Wherefore we here remit you the record of the decree aforesaid and the proceedings thereupon, in order for execution or otherwise, as aforesaid.

Witness the Honorable James P. Sterrett, doctor of laws, chief justice of our said supreme court, at Philadelphia, the 1st day of March, in the year of our Lord one thousand eight hundred and ninety-three.

CHAS. S. GREENE,
Prothonotary.

87 Endorsement: 56. June term, 1891. C. P. Lebanon. No. 275. January term, 1893. Supreme court. In the matter of the appeal of Lewis Miller *vs.* Cornwall Railroad Co. Remittitur. Filed March 2, 1893. Att'y, 3.00; pro., 7.25; rem., .75. Howard C. Shirk.

88 *Specifications of Error.*

Supreme Court of Pennsylvania, Jan'y Term, 1893.

LEWIS MILLER, Appellant,
vs.
THE CORNWALL R. R. Co., Appellee. } No. 273.

Specifications of error.

1st assignment of error. The court erred in not affirming the first point of the plaintiff, which was as follows:

"1. Lewis Miller, the plaintiff, was a passenger on the train when he received his injury."

Refused.

2nd assignment of error. The court erred in not affirming the second point of the plaintiff, which was as follows:

"2. The act of April 4, 1868, is unconstitutional and void."

Refused.

3rd assignment of error. The court erred in not affirming the 3rd point of the plaintiff, which was as follows:

"3. The right of the plaintiff to have remedy for his injury was a well-known and clearly defined common-law right, one of the 'inherent indefeasable rights' guaranteed to all citizens by the Constitution. The act of April 4, 1868, can therefore not be in-

voked by the defendant against the plaintiff, and it is not 'remedy by the due course of law.'"

Refused.

89 4th assignment of error. The court erred in holding that Lewis Miller, the plaintiff, was a fellow-servant of the engineer running the train when he received his injuries.

5th assignment of error. The court erred in entering judgment for the defendant *non obstante veredicto.*

6th assignment of error. The court erred in not entering judgment upon the verdict in favor of the plaintiff. Under all the evidence the case was one for a jury to pass upon.

7th assignment of error. The court erred in rejecting plaintiff's offer of evidence, which was as follows: "I want to show that he (Augustus Dewalt, the track foreman who put down the frog) didn't understand the business of putting down a frog properly. He says he did. To bear upon the question that the frog was not properly lined."

By the COURT: The offer is incompetent.

(Exception.)

A. FRANK SELTZER,
B. MORRIS STROUSE,
Att'ys for Plaintiff.

Endorsement: "No. 275. Jan. T., 1893. Supreme court of Penna., eastern district. Lewis Miller, appellant, *vs.* The Cornwall R. R. Co., appellee. Specifications of error. Filed Feb. 13, 1893. In the supreme court. A. Frank Seltzer and B. Morris Strouse, att'ys for plaintiff."

90 *Opinion of Supreme Court of Penna.*

LEWIS MILLER, Appellant,	E. D. 275. January Term,
vs.	1893. C. P. of Lebanon
THE CORNWALL RAILROAD COMPANY.	County.

Filed Feb. 27, 1893.

Per Curiam:

Judgment affirmed.

Endorsement: "No. 275. January term, 1893. E. D. Lewis Miller, appellant, *vs.* The Cornwall Railroad Company. C. P. of Lebanon county. Judgment affirmed. P. C. Filed Feb. 27, 1893. In supreme court."

I do hereby certify that the above and foregoing is a full, true, and accurate copy of the opinion delivered in the above-entitled cause in the supreme court of Pennsylvania, eastern district, and filed in the office of the prothonotary of said court.

In testimony whereof witness my hand and the seal of said court this 29th day of May, A. D. 1894.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

91 *Motion and Reasons for Reargument.*

Filed Jan'y 8th, 1894.

Supreme Court of Pennsylvania, Eastern District, January Term, 1893.

LEWIS MILLER, Appellant,
vs.
THE CORNWALL RAILROAD CO., Appellee. } No. 275.

Motion on the part of appellant for reargument.

The appellant most respectfully asks the court to grant a reargument in the above case for the following reasons, viz:

1. Because of material errors of fact into which the court fell, in the consideration of the case, and which, we believe, led to the affirmance of the judgment of the court below.

92 2. Because the plaintiff desires to present the case for review on the point raised, by the second assignment of error, as to the constitutionality of the act of April 4th, 1868, under the XIV amendment to the Constitution of the United States. The question was not orally argued for want of time and the judgment is not in shape for such a review.

3. General reargument.

As to the Question of Facts.

The syllabus of the case as reported in 154 Pa., 473, does not state the facts as they were presented to the jury and found by them.

The first paragraph of the syllabus says: "A person employed by the individual owner of cars run on a railroad, under a contract with the railroad company, is, when in charge of the cars, an employee of the railroad company within the meaning of the act of April 4, 1868. P. L., 58." This is not the fact in this case.

The plaintiff, the servant of Messrs. Coleman & Brock Bros., of North Lebanon furnaces, took the private freight cars of his masters from the furnaces to the yard of the defendant railroad company at Lebanon. There the defendant company took charge of them and hauled them to Cornwall, the plaintiff usually, although not regularly, riding along on the train. At Cornwall they de-

93 livered them to the Ore Hill Company—another company—which took charge of them and hauled them to the ore banks to be loaded with ore. The accident happened near Cornwall station while the train was in charge of defendants, the plaintiff performing none of the duties pertaining to the running of the train after he delivered the cars at the company's yard at Lebanon. He was not bound to go out on the freight train but could go on any train, whether freight or passenger, under the contract his employers had with the defendant company. At the time the accident happened he was not in charge of the cars in any sense whatever.

Therefore we most emphatically insist that the syllabus does not describe our case and therefore cannot be decisive of it. All the evidence upon this point bears out this assertion. See Plaintiff's Paper Book, Appendix, pages I, III, VI, X, (plaintiff's testimony) and XIII (Elmer Blantz brakeman's testimony).

Cause of the Accident.

On the cause of the accident as stated in the second paragraph of the syllabus the facts are misrecited. The plaintiff was hurt by a derailment of the train at a frog in a curve. The plaintiff claimed that the frog and guard-rail were laid upon rotten ties which made the road-bed unsafe; that the frog was not properly lined and laid and that the guard-rail was not in proper position and too short; claiming that the guard-rail, fixed upon worn-out and rotten ties, was most materially the cause of the accident. The syllabus
94 says that "the testimony of defendants' witnesses was positive and uncontradicted—that a new rail had been put in proper position on the day before the accident."

The evidence was all the other way upon this point. A new frog had been put in the evening before but the guard-rail was left untouched until two weeks after the accident, when a new and longer guard-rail was put down upon new ties. A new frog was just as dangerous as an old one, if the guard-rail was not properly placed to guide the train through the frog. And to guide a train, as in the present case, through a frog laid in a sharp curve of the road, required a guard-rail placed in exactly the proper position, firmly fixed upon a solid foundation and not upon rotten ties. Upon this point see Plaintiff's Paper Book, Appendix, pages XXIV–XXV, where Augustus Dewalt, defendants' section boss, admits that he only changed the sills and guard-rail on November 1st, two weeks after the accident.

He also admits that he did not examine the guard-rail when he put in the frog on the evening before the accident. Mahlon Smith, a repairsman, and another of defendants' witnesses, while testifying as to the putting in of the new frog on the evening before, says: (Appendix XXXI), "I can't say nothing about the guard-rail because I didn't pay any attention to that."

These are the only witnesses on this point and their testimony is conclusive as to the erroneousness of the statement in the syllabus.

95 This in addition to what is stated in Plaintiff's Paper Book, page 48, *et seq.*, to show that the finding of the cause of the accident, and therefore the case, was for the jury and not for the court.

Status of the Plaintiff.

On the question of the status of the plaintiff on the train (1st assignment of error) we again most respectfully refer the honorable court to our argument in Plaintiff's Paper Book, pages 29 to 35, where we contend that he was not a fellow-servant of the train

hands, as the court held below (4th assignment of error), but a passenger. On this point we will add a few additional observations.

A person can only enter and be upon the premises of a railroad company without being a trespasser by reason of a contract. If he enters in pursuance of a contract, he must do so either to perform some service for the railroad company for which they pay him a compensation, or a service is rendered to him by them for which he pays them a compensation. He must go there either to render or accept a service. All cases naturally and necessarily fall into the one or the other category. In this case the plaintiff paid for a service rendered him; why, then, should he be treated and have his case considered and decided "as if" he belonged to the other class?

To say that one who pays for a service rendered him shall be considered in the same class as the one who is paid for rendering the service, is so manifestly unjust that the very statement of the proposition should be enough to condemn it.

96 He was on the train of the defendants, but the answer to the question whether he was there as a quasi employee depends upon the fact whether he was there to help the train hands to run it. If he was not so helping he can neither be a fellow-servant nor a quasi fellow-servant. There is not a scintilla of evidence to show that he was helping to run the train. He himself and all the train hands swore that he was not. We therefore most respectfully challenge the logic by which the conclusion is reached that makes the plaintiff and the train hands fellow-servants. He was a passenger.

It seems to us that a court of justice has too high a regard for truth to ever consent to consider one thing "as if" it were another—one fact as another.

As to the Effect of the Act of April 4, 1868.

The remaining questions, the refusal of the court below to affirm the plaintiff's 2nd and 3rd points remain to be considered. They constitute the 2nd and 3rd assignments of error (see Plaintiff's Paper Book, page 26). These points were not orally argued for want of time.

By the 2nd point the court was asked to declare the act unconstitutional and void; first—because it was "the exercise by the legislature of power not legislative but judicial; second—because it is in violation of and avoided by the I section of the XIV amendment to the Constitution of the United States."

97 As this raises a question which is reviewable by a higher appellate court, and as the plaintiff desires to make such appeal, we most respectfully and earnestly ask this reargument; to which we add our personal request so that the decision in the case, at least upon this point raised, may be put into shape for review.

The 3rd point asks the court to restrain the operation of the act to the case of an injury resulting in death (see Plaintiff's Paper Book,

page 26). We state this point here because much that may be said on the preceding point is applicable to this.

The question under the XIV amendment has never been raised; and the only case in which the question of its being judicial power and the question whether it is applicable to a case for injuries not resulting in death have been specially raised is, Railroad Co. *vs.* Cook, 1 W. N. C., 319, where we understand the court to have decided as we now contend.

Decisions on the Statute.

A history of the decisions of the court upon the statute, which we will briefly give, show that every original position taken as to this act has been reversed, except Kirby *vs.* Penna. R. R. Co., 76 Pa., 506, wherein this court as recently said (Spisak *vs.* Balt. & Ohio R. R. Co., 152 Pa., 281, page 283), passed upon and affirmed its constitutionality only. We think this should follow the others.

98 In Cleveland & Pittsburg R. R. Co. *vs.* Rowan, 66 Pa., 393, page 399 (the first decision upon the act), the correct principle at once presented itself to the judicial mind. It was upon the consideration of the second section in an action for an injury resulting in death. Chief Justice Thompson in the opinion uses this language: "It is now the rule of this statute, and as such to be obeyed, where the action is for the loss of life. I say nothing about the cases of personal injuries, not followed by death. The right of action in the class of cases mentioned in the act are of different origin. The one is, and ever has been, a common-law right—the other is exclusively statutory, and capable of restriction and limitation by the legislature."

In other words, the power that grants a right only can limit or take it away. To our minds no principle is more firmly established than that the legislature cannot abridge or take away a common-law right. The people legislating in their sovereign capacity, by the adoption of a constitution placed this as all other common-law rights beyond the control of the legislature.

The second section of the act was in Railroad Company *vs.* Cook, 1 W. N. C., 319, and in Passenger Railway Co. *vs.* Bodrou, 92 Pa., 475, declared unconstitutional. As we look at the two sections, the first section is more offensive than the second. (On this point see Plaintiff's Paper Book, pages 42 and 43.)

Railroad Company *vs.* Cook, *supra*, and Passenger Railroad Co. *vs.* Bodrou, *supra*, were cases that arose before the adoption of the constitution, as was also Kirby *vs.* Penna. R. R. Co., *supra*.

99 In Penna. R. R. Co. *vs.* Langdon, 92 Pa. 21, the position was taken and it was held that, if "a railroad company accepted the provisions of the act, the same became thereby a part of the charter of the company, and the clause in the constitution of 1874, repealing all laws limiting the amount to be recovered in such cases, was inoperative as to said railroad company."

Thus practically holding it a special or private law.

In the subsequent case of Phila. & Reading R. R. Co. *vs.* Boyer,

97 Pa. 91, this position taken in Penna. R. R. Co. *vs.* Langdon, *supra*, was questioned in the following language: "It does not appear that Philadelphia & Reading Railroad Company ever formally accepted the provisions of the act so as to make them part of its charter. Under such circumstances whether the act applies at all to non-accepting companies, is an important question, and a still more important question is, admitting it thus to apply as a general law, though not part of the company's charter, what effect has the constitution of 1874 upon the statute by way of repeal?"

The entry of judgment was in excess of $5,000, and questions were not decided.

In Lewis *et al.*, receivers of the Phila. & Reading R. R. Co., 103 Pa. 425, the doctrine that it was a special or private law applicable only to accepting corporations was repudiated and the act declared
"a general law applicable to non-accepting as well as to ac-
100 cepting companies." It was further held that the second section of said act was avoided by article III, section 21, of the constitution of 1874.

Finally in Penna. R. R. Co. *vs.* Bowers, 124 Pa. 183, Penna. R. R. Co. *vs.* Langdon, *supra*, was squarely overruled, and the doctrine declared that even if a railroad company had accepted the act it was nevertheless avoided by section 21 of article III of the new constitution.

This history clearly shows that the first positions taken upon the statute were reversed by later ones in every case except Kirby *vs.* Penna. R. R. Co., *supra*.

As to the Test of the Applicability of the Statute.

Upon this point Spisak *vs.* Balt. & Ohio R. R. Co., 152 Pa. 281 and Vannatta *vs.* Central R. R. of New Jersey, 154 Pa. 262 are the latest deliverances. In the former case it is said that "the nature of the plaintiff's occupation at the time of the injury is the test of the applicability of the statute." While it is expressly stated that the decision is not an overruling of the cases of Cummings *vs.* R. R. Co., 92 Pa. and R. R. Co. *vs.* Colvin, 118 Pa. 230, the humanity and justice of the doctrine as laid down in the last two cases as compared with the brutality and injustice of the former is so manifest
that we think that these latter cases will be followed when
101 the former shall have fallen into disuse as precedents. To our minds, the case of Cummings *vs.* R. R. Co., *supra*, is squarely overruled by this last case of Vannatta *vs.* Central R. R. Co. of N. J., *supra*, as the facts are exactly identical. An examination of the two cases reveals the fact that the injury in each case was the result of the negligence of a railroad company while delivering freight at its destination.

"As If" Cases Held Unconstitutional.

Before beginning our argument as to the constitutionality of the act, and whether it should be restricted to injuries resulting in

death, we will state the facts in a few of the many "as if" cases cited in the Plaintiff's Paper Book (page 38).

In De Chastellux *vs.* Fairchild, 15 Pa., 18, the act of assembly in question enacted that a new trial be granted and allowed by the court of common pleas in a certain action therein instituted and carried to final judgment in this court, and directed "that the said case be proceeded in to trial and judgment, with like effects in all respects as if the same had not been heretofore tried in said court and passed upon on motion for a new trial."

In an opinion by Chief Justice Gibson, the act was held unconstitutional because the exercise of judicial power by the legislature.

In Menges *vs.* Dentler, 33 Pa., 495, the act of assembly declared that the sheriff's deed for a tract of land lying partly in
102 Lycoming county and partly in Northumberland county and sold by the sheriff of Lycoming county, Pa., upon process issued out of the common pleas of said county "should be good and valid to all intents and purposes, in the same manner and with the same effect, as if the whole of the said tract of land were situate in the county of Lycoming."

In the able opinion by Chief Justice Lowrie the court held the act unconstitutional.

In Baggs' appeal 43 Pa. 512, when the decree of final distribution in the estate of John H. Baughman, administrator of Andrew Hendrickson, of Allegheny county, deceased, had been made over eleven years, an act of assembly was passed declaring "that it shall be the duty of the orphans' court of Allegheny county, on petition of any party in interest, to grant a review of the administration account, &c., with the same effect as if application had been made within five years next after such decree."

The act was declared unconstitutional and void.

In these three cases, as well as in some others cited in Plaintiff's Paper Book, the acts in question were exactly similar to the one under consideration. The acts, as in this case, required the courts to consider one fact "as if" it were another. They cannot be distinguished in principle. If such act were always condemned by the court, why shall this be upheld?

The plaintiff was upon the cars of the defendants in pur-
103 suance of a contract. The contract was a lawful one. Under the contract the defendants received pay for taking him to Cornwall on their cars. Under the terms of this contract the plaintiff was not an employee of the defendants, nor was he doing any work that it was defendants' employees duty to perform. Can, then, an act of the legislature step in and change a lawful contract and substitute a new contract, without the consent of the parties, instead of the contract they themselves had made? Or can the legislature say that it is perfectly lawful and we will allow you to enter into such contracts, but we will direct the courts to consider such contracts not as they really are but as if they were different ones?

No! The legislature cannot change a fact or alter a lawful contract, or as Judge Ashman in the matter of the estate of Kate D. Hendrickson, says, "It transcends its powers when it undertakes to

change the nature of things." When we once in judicial proceedings, or in other affairs of life, cease to consider things what they are, we launch upon such a boundless sea of doubt and uncertainty as will deter the most courageous even to contemplate.

All these "as if" statutes above quoted and similar acts would in our judgment be clearly avoided in section I of the XIV amendment to the Constitution of the United States. To our minds they are "a denial of the equal protection of the laws."

Passengers are excepted by the act from its operation. Before its passage, the plaintiff would have been classed a passenger.

104 The case of the plaintiff and any other passenger cannot be distinguished. The rights of both rest upon contract. They both pay for the same service rendered—*i. e.*, their conveyance from one place to another. The mandate of the legislature to the courts cannot take the cases of a few of a class to which they belong and direct a special ruling; for that is denying "the equal protection of the laws" to those few (Plaintiff's Paper Book, pages 39 and 40).

The case of Millett *vs.* People of Illinois, 5 Western Reporter, page 155, to which special attention is directed, is as follows (syllabus): "The General Assembly has no authority to select out one class of business and deny to persons or corporations engaged therein the privilege to contract for labor and to sell their products without regard to weight, while at the same time it allows to persons engaged in all other classes of business these privileges; hence a statute which imposes on the owner of a coal mine the obligation to make all his contracts for labor to be regulated by weight, and imposes upon him the duty to provide scales for this purpose is unconstitutional."

The reasoning of the opinion bases the decision on the ground that such an act is unequal in its operation. It therefore would be avoided by the amendment. The opinion is an argument in support of our position on this act; and in it are cited a number of decisions on other acts held unconstitutional. On this point see also Cooley on Constitutional Limitations, pages 391 and 393.

105 When we take into account that nearly all the evidence taken in the case was upon the point as to what was the cause of the accident, no one can but think that with such a mass of testimony upon a single point, not only the controlling facts but the inferences therefrom must have been in dispute. The court below, therefore, disregarded the long-established rule of law that "the case is for the jury, where the evidence is of such a character that inferences of fact must be drawn therefrom" (Smith *vs.* Balt. & Ohio R. R. Co., 158 Pa. 82, and Bannon *vs.* Lutz, 168 Pa. 166), and committed error when they reversed the finding of the jury and entered judgment for the defendants *non obstante veredicto*.

When we observe that the facts of the case, judging from the statement thereof in the syllabus were not correctly apprehended by the court; when we contemplate the act in its gross absurdity and injustice, iniquity and inequality; when we recognize that acts of assembly exactly similar to this have been, by this court and courts of other States, held unconstitutional time and again; when

we remember that in the case of Kirby *vs.* Penna. R. R. Co., *supra*, its constitutionality was affirmed upon the false premise that the "act is a police regulation;" when we consider that this act does not establish a rule of property, the reversal of which would unsettle titles, we feel justified in our belief that this honorable court will grant us a reargument; and that if you will not entirely wipe out this "excrescence upon our system of jurisprudence" (York's appeal), which it has been sought and still is sought to trim into a more decent form, or restrict its operation to cases of injury
106 resulting in death, you will at least put the judgment upon the question raised under the XIV amendment into such a shape as to give us a fair opportunity to have it reviewed by the higher appellate court.

A. FRANK SELTZER,
B. MORRIS STROUSE,
Attorneys for Appellant.

We hereby certify that Railroad Co. *vs.* Cook, 1 W. N. C. 319, is not found in the Penna. State Reports, as far as we can ascertain.

A. FRANK SELTZER.
B. MORRIS STROUSE.

LEWIS MILLER, Ap't, } C. P. Lebanon Co., Jan'y T., 1893. No. 275.
v.
CORNWALL R. R. Co. }

Filed Feb. 5th, 1894.

Per Curiam:

Reargument refused.

Endorsement: No. 275. Jan'y T., 1893. Lewis Miller, ap't, *vs.* Cornwall Railroad Co. C. P. Lebanon Co. Reargument refused. *Per curiam.*

I do hereby certify that the above and foregoing is a full, true, and accurate copy of the order delivered in the above-entitled cause in the supreme court of Pennsylvania, eastern district, and filed in the office of the prothonotary of said court.

In testimony whereof witness my hand and seal of said court this 29th day of May, A. D. 1894.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

107 UNITED STATES OF AMERICA, } ss:
State of Pennsylvania, }

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, eastern district, do hereby certify that the foregoing record, pages 1 to 106, inclusive, is a true and faithful copy of the record

and proceedings of the supreme court of the State of Pennsylvania, eastern district, in a certain suit therein pending wherein Lewis Miller was appellant and The Cornwall Railroad Company was appellee.

Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said supreme court of the State of Pennsylvania, eastern district, at Philadelphia, the 29th day of May, 1894, and in the one hundred and eighteenth year of the Independence of the United States.

CHAS. S. GREENE,
Prothonotary of the Supreme Court of Pennsylvania, Eastern District.

108 I, James P. Sterrett, chief justice of the supreme court of Pennsylvania, do hereby certify that Charles S. Greene was, at the time of signing the annexed attestation, and now is, prothonotary of the said supreme court of Pennsylvania, in and for the eastern district, to whose acts, as such, full faith and credit are and ought to be given, and that the said attestation is in due form.

In witness whereof I have hereunto subscribed my name this 29th day of May, one thousand eight hundred and ninety-four.

JAMES P. STERRETT,
Chief Justice Sup. Court.

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, in and for the eastern district, do certify that the Honorable James P. Sterrett, by whom the foregoing certificate was made and given, was, at the time of making and giving the same, and is now, chief justice of the supreme court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in courts of judiciary as elsewhere, and that his signature thereto subscribed is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said supreme court of Pennsylvania, in and for the eastern district, at Philadelphia, this 29th day of May, one thousand eight hundred and ninety-four.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

109 In the Supreme Court of the United States.

LEWIS MILLER
vs.
THE CORNWALL RAILROAD CO. } No. —. October Term, 1894.

Surwrit of error by Lewis Miller to the supreme court of Pennsylvania.

Assignments of Error.

1. The learned court erred in not sustaining the first specification of error submitted by Lewis Miller; which specification of error was as follows: "The court erred in not affirming the first point of the plaintiff, which was as follows: '1. Lewis Miller, the plaintiff, was a passenger on the train when he received his injury.'" Refused.

2. The learned court erred in not sustaining the second specification of error submitted by Lewis Miller; which specification of error was as follows: "The court erred in not affirming the second point of the plaintiff, which was as follows: '2. The act of April 4th, 1868, is unconstitutional and void.'" Refused.

3. The learned court erred in not sustaining the fourth
110 specification of error submitted by Lewis Miller; which specification of error was as follows: "The court erred in holding that Lewis Miller, the plaintiff, was a fellow-servant of the engineer running the train when he received his injuries."

4. The learned court erred in not sustaining the fifth assignment of error submitted by Lewis Miller, which was as follows: "The court erred in entering judgment for the defendant *non obstante veredicto.*"

5. The learned court erred in not sustaining the sixth assignment of error submitted by Lewis Miller, which was as follows: "The court erred in not entering judgment upon the verdict in favor of the plaintiff. Under all the evidence the case was one for a jury to pass upon."

6. The learned court erred in not granting the prayer of the plaintiff for a reargument and in not reversing the judgment of the court of common pleas of Lebanon county in entering judgment for the defendant *non obstante veredicto.*"

7. The learned court erred in not reversing the judgment of
111 the court of common pleas of Lebanon county in favor of the defendants, The Cornwall Railroad Company, notwithstanding the verdict of the jury in favor of the plaintiff, Lewis Miller, and in not entering judgment in favor of the plaintiff, Lewis Miller, and against the defendants, The Cornwall Railroad Company, upon the verdict of the jury.

To the honorable the judges of the Supreme Court of the United States of America:

Your petitioner prays for a reversal of the judgment entered in the supreme court of Pennsylvania for the reasons assigned above.

LEWIS MILLER,
By his attorneys, A. FRANK SELTZER,
B. MORRIS STROUSE.

June 2, 1894.

112 [Endorsed:] In U. S. Supreme Court. No. —. —— term, 1894. Lewis Miller (plaintiff in error) *vs.* The Cornwall Railroad Co. (defendant in error). Assignments of error. A. Frank Seltzer, B. M. Strouse, attorneys for plaintiff.

Endorsed on cover: Case No. 15,601. Pennsylvania supreme court. Term No., 112. Lewis Miller, plaintiff in error, *vs.* The Cornwall Railroad Company. Filed June 5th, 1894.

No. 18.

Brief of Seltzer for P. P.

Supreme Court of the United States.

Filed Sept 30, 1897.

No. 18, OCTOBER TERM, 1897.

LEWIS MILLER,

Plaintiff in Error,

VS.

THE CORNWALL RAILROAD COMPANY,

Defendant in Error.

In Error to the
Supreme Court of the State of Pennsylvania.

PAPER BOOK OF PLAINTIFF IN ERROR.

A. FRANK SELTZER,
B. MORRIS STROUSE,
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

No. 18, OCTOBER TERM, 1897.

LEWIS MILLER,

Plaintiff in Error,

VS.

THE CORNWALL RAILROAD COMPANY,

Defendant in Error.

In Error to the
Supreme Court of the State of Pennsylvania.

PAPER BOOK OF PLAINTIFF IN ERROR.

1. STATEMENT OF THE CASE.

The plaintiff in error sued the Cornwall Railroad Company, a corporation of the State of Pennsylvania, in the Court of Common Pleas of Lebanon county, Pennsylvania, in trespass to recover damages for personal injuries sustained through the negligence of the said Cornwall Railroad Company while (as he claims) a passenger on one of their trains.

The facts in the case were these, viz:

Messrs. Coleman & Brock Bros. are the proprietors of the Lebanon Furnaces on the outskirts of Lebanon. Five miles distant are the Cornwall Ore Hills. These two points are connected by the Cornwall Railroad Company. Messrs. Coleman & Brock Bros. received large quantities of ore from the Ore Hills over the Cornwall Railroad Company; and for this purpose they had their own private cars which were carried between their furnaces and Cornwall by the defendant company.

The contract between Messrs. Coleman & Brock Bros. and the Cornwall Railroad Company was as follows:—Messrs. Coleman & Brock Bros. were to deliver their cars at the yard of the railroad company at Lebanon, and then the railroad company would take charge of them out to Cornwall. Here Messrs. Coleman & Brock Bros. would take charge of them again, have them taken by another company to the ore banks, loaded with ore and returned to Cornwall. From here the cars would be carried to Lebanon Furnaces by the defendant company.

Lewis Miller, the plaintiff in the case, was the servant of Messrs. Coleman & Brock Bros. to run the cars from the furnaces down to the railroad company's yard, which was done by gravity, deliver them to the conductor of defendant company and take charge of them again when delivered at Cornwall, see that they were loaded with ore and

delivered again at Cornwall to defendant company to haul to Lebanon furnaces.

The contract further provided that the charge for freights against Messrs. Coleman & Brock Bros. should include the right of their servant when engaged in this work to pass to and fro between Cornwall and Lebanon on any train most convenient to him, *whether passenger or freight.*

The accident from which the injury resulted to the plaintiff occurred on Oct. 16, 1890, at a point in the road about 100 yards south of Cornwall Station, at a frog in a sharp curve from which a siding runs to a warehouse. That morning Mr. Miller, the plaintiff, brought about a dozen or twenty of Messrs. Coleman & Brock Bros.' cars down from the furnaces to the defendant company's yard. The company made up a freight train, including therein the cars brought down from the furnaces by Mr. Miller, and started southward towards Cornwall, Mr. Miller riding on the train. When they came to the frog and switch on the other side of Cornwall, the hind part of the train ran off the track and was wrecked. In this wreck Mr. Miller was hurt.

The plaintiff's allegation was that the cause of the accident was the unsafe condition of the track and frog at this point where the accident occurred. He further alleged that the too fast running by the engineer contributed to the accident. Much testimony was taken on these points by both plaintiff and defendants. The Court below

left the case to the jury and reserved the question "as to whether there was any evidence of the defendants' negligence to go to the jury."

The jury returned a verdict in favor of the plaintiff for $900.

At the trial of the case the fundamental question was whether (as contended by the plaintiff) his case was that of a passenger seeking to recover against his carrier or that of an employee seeking to recover against his employers, and the determination of the question depended upon whether the first section of the Act of the General Assembly of the State of Pennsylvania, approved April 4, 1868, (P. L. 58), was unconstitutional and avoided by the 1st section of the XIVth Amendment to the Constitution of the United States.

The 1st section of the Act of April 4, 1868, reads as follows, viz:

"Sec. 1. When any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be only such as would exist if such person were an employee: Provided, that this section shall not apply to passengers."

Under the laws of the State of Pennsylvania as they are now and were at the time of the pas-

sage of this Act, all that a passenger injured through some defect in the road-bed, or in the means of transportation, need prove is, that he was injured while riding on the train, and the law presumes that the carrier was negligent, and it then becomes the duty of the carrier to show that he was not negligent, and that the injury was caused by some cause for which he was not responsible; while in a suit by an employee the rule is different, and it is necessary for the employee to affirmatively prove that the employer was negligent and failed in his duty.

Before the Court and jury, and before the Supreme Court of Pennsylvania, the plaintiff contended that the 1st section of the Act of April 4, 1868, was unconstitutional, alleging amongst other reasons, that it was avoided by section 1st of the XIVth amendment to the constitution of the United States, and could not be considered in the trial of the case, and that therefore the plaintiff when injured, was a passenger on defendants' train. The defendants affirmed the constitutionality of the Act, and contended that the plaintiff should be treated as an employee of the defendants, and a fellow-servant of the train hands running the train on which he was when injured, and that if the accident was caused by excessive fast running of the train the negligence was that of the engineer running the same, a fellow-employee, for which plaintiff could not recover.

The plaintiff also asked the Court to charge the jury, *inter alia*, as follows, viz:

"1st. Lewis Miller, the plaintiff, was a passenger on the train when he received his injury."

"2nd. The Act of April 4, 1868, is unconstitutional and void."

"3rd. The right of the plaintiff to have remedy for his injury was a well-known and clearly defined common law right, one of the inherent indefeasible rights guaranteed to all citizens by the constitution. The Act of April 4, 1868, can therefore not be invoked by the defendant against the plaintiff. And it is not remedy by the 'due course of law.'"

"4th. If the jury believe that the train ran off the track because of the too fast driving over the frog in the curve of the road then the defendants' negligence is made out, and the plaintiff is entitled to recover, unless he by some act contributed to his own injury."

These points were all refused by the Court, who in their charge left the question of defendants' negligence and the question of plaintiff's contributory negligence to the jury, with instructions that they were to treat the plaintiff as if he was an employee of The Cornwall Railroad Company, and that his right of recovery was only that of an employee, and that if they found that the train ran off the track because of the too fast running of the same, the plaintiff could not recover, because the engineer, whose negligence in that case caused the accident, was his fellow-servant.

Under the laws of the State of Pennsylvania, if the first section of the Act of April 4, 1868, is

unconstitutional, the right of action and recovery of the plaintiff was that of a passenger, and not such only as would exist if he had been an employee of the defendants; and that the laws of the State of Pennsylvania applicable to the case of the plaintiff as a passenger injured through the negligence of the defendants, a carrying railroad company, would have required the Court at the trial to submit the question of defendants' negligence and plaintiff's contributory negligence to the jury without the reserved question whether there was "any evidence of defendants' negligence to go to the jury," and would have required the Court, as a matter of law, to declare that the engineer of the defendants, running the train on which the plaintiff was riding when injured, was the servant of the defendants and his negligence, their negligence, and not the fellow-servant of the plaintiff, and would have required the court to submit the question of the engineer's negligence in running the train too fast, and thereby contributing to the accident, to the jury instead of withdrawing it from them and imputing it to a fellow-servant, and would have required the Court to enter judgment upon the verdict of the jury in favor of the plaintiff.

The said Court of Common Pleas of Lebanon county directed judgment to be entered in favor of the defendants, The Cornwall Railroad Company, notwithstanding the verdict of the jury in favor of the plaintiff.

That the said Lewis Miller, plaintiff, by an

appeal, took the said cause to the Supreme Court of Pennsylvania, to No. 275, January Term, 1893, Eastern district; which Court affirmed the judgment of the Court of Common Pleas of Lebanon county against the plaintiff and in favor of the defendant, the Cornwall Railroad Company.

Afterwards on January 8, 1894, the plaintiff moved the Supreme Court of Pennsylvania for a re-argument of the cause, alleging again, *inter alia*, the reason that the first section of said Act of April 4, 1868, was unconstitutional and avoided by the 1st section of the XIVth amendment to the Constitution of the United States; which argument asked for was also refused.

We therefore most respectfully ask the Court to reverse the Supreme Court of Pennsylvania on the ground that the Act of April 4, 1868, is not "Due process of law," and is a denial to the plaintiff by the State of Pennsylvania of "The equal protection of the laws."

II. ASSIGNMENTS OF ERROR.

1. The learned Court erred in not sustaining the first specification of error submitted by Lewis Miller, which specification of error was as follows: "The Court erred in not affirming the first point of the plaintiff, which was as follows: 'I, Lewis Miller, the defendant, was a passenger on the train when he received his injury.'" Refused.

2. The learned Court erred in not sustaining the second specification of error submitted by Lewis Miller, which specification of error was as follows: "The Court erred in not affirming the second point of the plaintiff, which was as follows: '2. The Act of April 4th, 1868, is unconstitutional and void.'" Refused.

3. The learned Court erred in not sustaining the fourth specification of error submitted by Lewis Miller, which specification of error was as follows: "The Court erred in holding that Lewis Miller, the plaintiff, was a fellow-servant of the engineer running the train when he received his injuries."

4. The learned Court erred in not sustaining the fifth assignment of error submitted by Lewis Miller, which was as follows: "The Court erred in entering judgment for the defendant, *non obstante veredicto*."

5. The learned Court erred in not sustaining

the sixth assignment of error submitted by Lewis Miller, which was as follows: "The Court erred in not entering judgment upon the verdict in favor of the plaintiff. Under all the evidence the case was one for a jury to pass upon."

6. The learned Court erred in not granting the prayer of the plaintiff for a re-argument and in not reversing the judgment of the Court of Common Pleas of Lebanon county in entering judgment for the defendant, *non obstante veredicto*."

7. The learned Court erred in not reversing the judgment of the Court of Common Pleas of Lebanon county in favor of the defendants, The Cornwall Railroad Company, notwithstanding the verdict of the jury, in favor of the plaintiff, Lewis Miller; and in not entering judgment in favor of the plaintiff, Lewis Miller, and against the defendants, The Cornwall Railroad company, upon the verdict of the jury.

III. ARGUMENT OF PLAINTIFF IN ERROR.

The whole case turns upon the question whether the first section of the Act of the General Assembly of the State of Pennsylvania, approved April 4, 1868, is constitutional or is unconstitutional and avoided by the 1st section of the XIVth Amendment to the Constitution of the United States. (1st section printed on page 4.)

The second section of the same act, which reads as follows, viz:—

"Section 2. That in all actions now or hereafter instituted against common carriers or corporations owning, operating or using a railroad as a public highway, whereon steam or other motive power is used, to recover for loss and damage sustained and arising either from personal injuries or loss of life, and for which, by law, such carrier or corporation could be held responsible, only such compensation for loss and damage shall be recovered as the evidence shall clearly prove to have been pecuniarily suffered or sustained, not exceeding, in case of personal injury, the sum of three thousand dollars, nor in case of loss of life, the sum of five thousand dollars." was in *Passenger Railway vs. Boudrou*, *92 Pa. 475*, declared unconstitutional, the Court using this language:—

"But one point (*p. 481*) remains that calls for remark. In Central Railroad of N. J. vs. Cook, 1 W. N. C. 319, it was held that a plaintiff can recover the amount of his loss or damage, that he pecuniarily suffered or sustained from personal injuries by reason of the defendant's negligence, notwithstanding the Act of April 4, 1868, Pamph. L. 58. * * * Its authority is in conservation of the reserved right to every man, that for an injury done him in his person, he shall have remedy by due course of law. The people have withheld power from the legislature and the courts to deprive them of that remedy, or to circumscribe it so that a jury can give only a pitiful fraction of the damage. Nothing less than the full amount

of pecuniary damage which a man suffers from an injury to him in his lands, goods or persons, fills the measure secured to him in the Declaration of Rights. As well might it be attempted to defeat the whole remedy as a part. * * * A limitation of recovery to a sum less than the actual damage, is palpably in conflict with the right to remedy by the due course of law."

This language is of stronger force against the first than the second section. The second limits the amount of compensation but leaves the right to it complete; the first limits, lessens, abridges the right, takes away all compensation. If we for a moment concede that the Legislature had the authority to abridge the right to compensation, we acknowledge the authority to take away the entire right, and leave the injured party without redress. We can make no such a concession. Nor does the law.

1st. THE PLAINTIFF A PASSENGER.

The proviso of the Statute says: "This section shall not apply to passengers." Under the law of the State of Pennsylvania as it was before the passage of this Act, the plaintiff was clearly a passenger, as the citations below undeniably establish. We, however, contended further that, when the Legislature added the proviso in favor of passengers, it included the case of the plaintiff, because they were presumed to have known the law (Endlich on the Interpretation of Statutes,

Sec. 182), and meant all passengers; and did not intend to make or have the Courts to make a new definition for a passenger, but intended to accept the Court's definition as it then existed. This is especially true of an Act which, if not more, is in derogation of the common law, and is said (*Kirby vs. Penna R. R. Co. 76 Pa. 507*) to be in the nature of a penal statute.

To enlarge. The plaintiff was not employed by the defendant Company, but by Messrs. Coleman and Brock Bros. The plaintiff brought the cars to defendants' yards at Lebanon and took charge of them again when delivered by defendants at Cornwall. The trip took about twenty minutes. While the train was being run to Cornwall, the plaintiff had nothing to do with the cars or their running. They were solely in the charge of defendants' servants.

Another important fact is, the plaintiff was not required to ride with or on the cars he brought to defendants' yard; but could go on any train that suited his convenience, *whether freight or passenger*. While he was on the train he was "engaged or employed" in nothing in the sense in which these words are used in the Statute properly construed. It is true he was on the cars and going over the road. But so is any other passenger. He was engaged or employed in doing the work of Messrs. Coleman & Brock Bros. But only in the same sense as a drummer starting out from New York or Philadelphia is "engaged or employed" by the

firm that purchases his labor. Nobody would dream of classing a drummer anything but a passenger.

What should the trial Court have called him had he been hurt while going to Cornwall on a passenger train on the same errand? Had one of the firm chosen to go for a load of ore instead of sending their servant, should he be treated as an employee of defendants? And yet, did not the plaintiff stand on the rights of his employers? Certainly! Had the plaintiff been hurt while on a passenger train, the trial Court could hardly have fallen into the outrageous error of considering the plaintiff anything else than a passenger. The work of the plaintiff was at Cornwall, and the defendants were in truth only carrying him to and from his work and *were well paid* for doing so.

Cases similar to this were thrice decided by the Supreme Court of Pennsylvania, two before and one after the passage of the Act. In each case, not one of which was as strong as this, the plaintiff was declared a passenger. The first in point of time was *Penna. R. R. Co. vs. Henderson, 51 Pa. 315*, decided May 15, 1866. It is as follows:— Henderson was a drover and transported several carloads of cattle from Indiana to Philadelphia and received a "drover's pass" to the same place. He paid nothing for his ticket. Held that the price Henderson paid for the freight included the cost of his passage, and that he was "not therefore a gratuitous but a paying passenger."

There is no difference between the plaintiff's case and that of Henderson's except that the one shipped ore and the other cattle; and with the change of the word "ore" for "cattle," the language used in that case could be applied to this.

The next case was that of the *Cumberland Valley R. R. Co. vs. Meyers, 55 Pa. 288*, decided July 3, 1867, which was as follows:—Meyers was a private conductor for the firm of Henderson & Meyers whose cars the railroad company moved by their engines. Immediately behind the cars of Meyers were cars of another party to be left at Mechanicsburg. At the request of the Company's conductor, Meyers drew the coupling at a signal from the private conductor of the hind cars. Meyers was thrown off and hurt. The case was tried and found in favor of Meyers and reviewed by the Supreme Court, and it was held that Meyers was a passenger. The court used this language: "He did an act of mere accommodation at the request of the conductor without hire or reward, and as soon as he had performed it and resumed his proper position of a passenger on the train he became entitled to the protection which such a relation gave him, and a jury would not be called on to discriminate against him with an unfriendly eye." The Court also says that if Meyers had been hurt while engaging in uncoupling, he could not have recovered.

The plaintiff's case is much stronger. He only used the trains of defendants to go to and from his work, which was at Cornwall.

The last case was that of *O'Donnell vs. The Allegheny Valley R. R. Co., 59 Pa. 239*, decided after the passage of the Act. O'Donnell, living at Kittanning, was hired by the Company to work on the railroad at a bridge crossing the Kiskeminetas, fifteen miles south of Kittanning. O'Donnell, for the wages he received, was to have the privilege of riding to and from his work free of charge. He was injured one evening while riding home from his work. On a review of the case, it was held that O'Donnell was a passenger and *not a fellow-servant of the train hands.* In the opinion *Cumberland Valley R. R. Co. vs. Meyers* is commented upon and approved as the general and safe rule governing such cases.

To these authorities directly in point we can not help but add the comments on the case of *Penna. R. R. Co. vs. Henderson, supra*, in the case of *Penna. R. R. Co. vs. Price, 96 Pa., 256, page 266:*—"He (Henderson) was traveling with his stock, and was as much a passenger as if he had been traveling with his trunk. He was under the control of the conductor, and was bound to conform to the reasonable rules of the company the same as other passengers. He had a direct contract relation with the company. * * * It may very well be that *Henderson vs. Railroad Co.* belongs to a class of cases intended to be covered by the proviso of the Act of 1868."

In the case a passenger is defined as "One who travels in some public conveyance by virtue

of a contract, express or implied, with the carrier, as the payment of fare, or that which is accepted as equivalent therefor."

This definition of a passenger describes the plaintiff's case exactly.

Had the trial Court and the Supreme Court of Pennsylvania affirmed our position that the Act of April 4, 1868, was avoided by the first section of the XIVth Amendment to the Constitution of the United States, the case of the plaintiff would have been that of a passenger seeking to recover against his carrier instead of an employee seeking to recover against his employer. In such case, under the laws of the State of Pennsylvania, it would have been the duty of the trial Court to affirm the plaintiff's first point and declare him a passenger, and also to submit the question of defendant's negligence to the jury without reservation. The law would also have required the Court to submit the question of the engineer's negligence in running the train too fast to the jury as in such case the negligence of the engineer would have been the negligence of the company. The question would then have been one entirely for the jury. Even upon the one-sided way it was submitted to them, they found in favor of the plaintiff.

"When in the performance of this contract (that of a passenger), a passenger is injured, without fault on his part, the law raises, *prima facie*, a presumption of negligence, and throws on the Company the *onus* of showing it did not exist.

This legal presumption may be repelled by proving that the injury resulted from inevitable accident, or that it was caused by something against which no human foresight and prudence could provide. Whether such circumstances exist as will repel the legal presumption of negligence, is a question of fact to be determined by the jury, from all the evidence in the case."

Sullivan vs. The Phila. and Reading R. R. Co., 30 Pa. 234.

"Where a passenger is injured by an accident arising from a collision, or a defect in the machinery or roadway, he is required, in the first place to prove no more than the fact of the accident and the extent of the injury; a *prima facie* case is thus made out, and the onus is thus cast upon the carrier to disprove negligence. This prima facie presumption may be overthrown by proof, to the satisfaction of the jury, that the injury complained of resulted from inevitable accident, or from something against which no human prudence or foresight could provide."

Phila. and Reading R. R. Co. vs. Anderson, 94 Pa. 351.

"The presumption of a fact in law, which carries a case to the jury, necessarily leaves them in the possession of the case, without regard to the strength of the rebutting evidence."

Railroad Co. vs. Miller, 87 Pa. 395.
Railroad Co. vs. Weiss, 87 Pa. 447.
Railroad Co. vs. Schultz, 93 Pa. 341.
Spear vs. Railroad Co. 119 Pa. 61.

Having said so much in explanation of how the case turns upon this statute, let us ask

WHY WAS THE ACT PASSED?

Chief Justice Paxson in *Penna. Railroad Co. vs. Price, 96 Pa. 256, page 264*, argumentatively supposes in this language as to what might have actuated the Legislature to create the monster of April 4, 1868.

"At the time this decision was rendered (Catawissa R. R. Co. *vs.* Armstrong, 49 Pa. 186), the law seemed to contemplate but two classes of persons on railroad trains, viz: 1. Passengers who paid fare or who travelled by virtue of a contract relation with the company, and 2. Employees who were in the service of the company. The Act of 1868 was manifestly intended to create a third class who were neither employees nor passengers, namely, persons who are 'lawfully engaged or employed in or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein, of which such person is not an employee.'" He, however fails to define such class; and in a lengthy opinion of poor law and worse reasoning (as we think) the judgment is rendered that a route agent of the United States Post Office Department, injured while at his place in his car with the train, through the negligence of the Penna. R. R. Co., without any negligence on his part, by two trains going in opposite directions on the same track running into

each other, was without remedy by reason of the Act of April 4, 1868.

Other cases that are as bad if not worse than this one, are *Cummings vs. R. R. Co., 92 Pa. 82; Railroad Co. vs. Colvin, 118 Pa. 230; Riard vs. North Penna. R. R. Co., 89 Pa. 193, and Kirby vs. Penna. R. R. Co., 76 Pa. 506.*

The Act was largely discussed in the Constitutional Convention of Pennsylvania in 1873. In the printed debates thereof, in volume 2, page 731, this language is used by Mr. Newlin, one of the members, viz: "I think, sir, that all that is proven by the fact that these 'blood acts'—for that is the name by which they should be known—the only argument, the only thing which can be shown by the existence of these infamous acts upon the statute books of other states is that the same influence which was brought to bear upon the State of Pennsylvania to put that infamy upon our statute books was used in other states as well. It is a notorious fact, it is well known to every one in this community that the Act of Assembly of Pennsylvania which limits the liabilities of railroad companies in cases of accidents; it is perfectly well known and notorious that the act was *bought* and *paid for*, and that it passed the Legislature of this state by corrupt means."

The act is thoroughly discussed from pages 727 to 744 in said volume 2.

In volume 5, page 293, this language was used:—

"Mr. Cuyler. The reasons that led to the passage of the act need not be enumerated. They were persuasive of the legal mind.

"Mr. Mann. Mr. President: I simply wish to sustain the view of the gentleman from Philadelphia, that the reasons urged on the Legislature for the passage of what is known as the calamity act were very persuasive. Quite a number of gentlemen were convinced by the persuasion. (Laughter.)

"Mr. Cuyler. I would inquire of the gentleman the source of his knowledge on the subject, as he was a member of that very House."

Justice Paxson may be in error as to the reason of the passage of this act—this infamy!

Of course we do not cite these Convention Debates as authority, but it will not deter from inquiring more closely into the Act's constitutionality.

WHY HELD CONSTITUTIONAL BY STATE COURTS.

The constitutionality of this act has been constantly questioned under the Constitution of the State, but the point raised under the XIVth amendment had not before this case been raised. The case in which the Supreme Court of Pennsylvania upheld its constitutionality was that of *Kirby vs. Penna. R. R. Co., 76 Pa. 507.*

The general ground upon which the Court there affirms the Act is valid as that it is an exer-

cise of the police power by the State. Speaking in reference to the facts in the case, the Court uses this language:

"The relation he assumes is one of danger, and the fact of danger authorizes the regulation by the State, as the conservator of the lives, security and property of her citizens. The act is a police regulation, which having respect to the general good, forbids individuals from undertaking a dangerous employment, except at their own risk, to the same extent as if they were in the immediate employment of the railroad company."

The reason upon which the decision is put, that it is a police regulation, is wholly fallacious. It is not a police regulation because it does not regulate. It was not passed by the Legislature as such, but as an "Act regulating to railroad companies and common carriers, defining their liabilities." The general public is not affected by it. In every case yet considered in the Supreme Court, the only parties concerned were the Railroad Company defending their negligence against the suit of the plaintiff. The Act might appropriately have been called "An Act to relieve railroad companies from liability for negligence.", or "An Act to make a gift of the blood, the limb, the life of certain specifiedly situated citizens to railroad companies."

This Act can not come within the scope of a police regulation. The limit to the exercise of the police power, as laid down in *Potter's Dwarris page*

458, is this:—"The regulation must have reference to the comfort—the safety—or the welfare of society; and not in conflict with the provisions of the Constitution." This Act is so far from coming up to this definition of this power as to be not within sight of the mind's eyes. The public is not concerned in the remotest degree. The parties to a contract only are concerned in this case and undoubtedly in all conceivable cases.

In *Louisville vs. Nashville R. R. Co. vs. Commonwealth of Kentucky*, 161 U. S. 677 (40-849), the following language is used:—"Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state and within legislative control, in the exercise of which the legislature is vested with a large discretion beyond the reach of judicial inqury, if it is exercised *bona fide* for the protection of the public."

As said in *Lawton vs. Steele*, *152 U. S. 133* (38-385):—"The police power of a state extends to everything essential to the public safety, health, morals, and justifies the destruction or abatement by summary proceedings, of whatever may be regarded as a public nuisance. To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legisla-

ture may not under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

"In Rockwell vs. Nearing, 35 N. Y. 302, an act of the legislature of New York which authorized the seizure and sale without judicial process of all animals found trespassing within private enclosures, was held to be obnoxious to the Constitutional provision that no person should be deprived of his property without due process of law. See also Austin vs. Murray, 16 Pick. 121; Watertown vs. Mayo, 109 Mass. 315, 12 Am. Rep. 694; Butcher's Benev. Asso. vs. Crescent City L. S. L. & S. H. Co. ("Slaughter House Cases"), 83 U. S. 16 Wallace 36 [21:394]; Re Cheesebrough, 78 N. Y. 232; Brown vs. Perkins, 2 Gray 89. In all these cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property, and a practical inhibition of certain occupations harmless in themselves, and which might be carried on without detriment to the public interests."

This Act does not come up at all to the requisites above laid down. In every case there are only two parties concerned, the robbed and the robber—in no case the public.

In *Brennan vs. City of Titusville*, 153 U. S.

289 (*38-719*), reversing the Supreme Court of Pennsylvania (*143 Pa. 642*) Justice Brewer uses this language in reference to the discrimination between citizens under the guise of its being a police regulation, viz:—

"There is no discrimination except between manufacturers and licensed merchants on the one hand, and the rest of the community on the other, and unless it be a matter of just police regulation to tax for the privilege of selling to manufacturers and merchants, it can not be to tax for the privilege of selling to the rest of the community. If, under the excuse of an exercise of the police power, this ordinance can be sustained, and sales in the manner therein named be restricted, by an equally legitimate exercise of that power almost any sale could be prevented."

So, if this Act is a legitimate exercise of the police power, almost any of the rights of a citizen can be taken away under it.

In a late case in Pennsylvania, *Commonwealth vs. Zacharias, 3 Penna. Sup. Court Reports, 264*, decided in 1897, an Act of Assembly regulating the business of druggist, which permitted certain unqualified persons (the widow of a qualified person) to engage in the retail drug business, was declared unconstitutional, the Court using this language:—

"If a statute is only directed against certain persons who are engaged in a given business or against commodities in such a manner as to dis-

criminate between those who are engaged in the same trade or pursuit, in aid of some, at the expense of others, such statute is not a police but a trade regulation. The Act of 1891, in that it permits certain unqualified persons to engage in the retail drug business and excludes others, is not an exercise of police power, but presents a condition of class legislation and is therefore unconstitutional, and falls under the ruling of Sayre Borough vs. Phillips, 148 Pa. 482."

In *Sayre Borough vs. Phillips*, which was the case of an ordinance prohibiting all persons from peddling within its limits except citizens of the borough, Justice Williams declared the same unconstitutional, saying:—

"It is very clear that a police regulation must be directed against the business or practice that is harmful, not against one or some of the persons who may be engaged in it. If a statute or municipal ordinance is in reality directed against certain persons who are engaged in a given business, or against certain commodities, in such manner as to discriminate between the persons who are engaged in the same trade or pursuit, in aid of some, at the expense of others, such statute or ordinance is not a police but a trade regulation, and it has no right to shelter itself behind the police power of the state or municipality. * * * The proviso converts the police regulation into a trade regulation."

These citations thoroughly dispose of and

refute the claim that the statute is a police regulation. It is in short no regulation at all, but a simple taking from one and giving to another.

And upon this point in *Norman vs. Heise, 5 Watts & Sergeant, 171*, the Court uses this language:—"The Legislature cannot take the property of one individual, with or without compensation, and give it to another." (The statute here considered was an *as if* one).

And in *Calder vs. Bull, 3 Dallas 386*, the Court says:—"This fundamental principle flows from the very nature of our free republican government that no man should be compelled to do what the laws do not require, nor refrain from acts which the laws permit."

It is not a police regulation. That claim is absurd.

ITS CONSTITUTIONALITY.

Having shown the falsity of the position sustaining it as a police regulation, let us ask ourselves what is the Act? What does it do? It is an Act, as stated in its title, "defining the liabilities" of railroad companies. It therefore deals with the rights of parties. The right of a person to have redress against another through whose negligence he has suffered an injury was a clearly defined and well understood right before the passage of the Act. It was a well-known common law right, existing prior to all statute law, when the Constitution was adopted. This right became

one of the "inherent indefeasible rights" which are declared to be "excepted out of the general powers of government to remain forever inviolate." The effect of this Act is to destroy this fundamental right of the citizen when in a certain situation. *It takes the right from the party to whom it belongs and bestows it without compensation* to the railroad companies. And it is done, not by a law passed, applicable to all alike—*not by changing a rule of right*—but by a legislative direction to the Courts commanding them when a certain state of facts exist which would require the application of a certain principle of justice and right, *not* to decide the merits of the case according to that principle, but according to a principle applicable to a quite different state of facts. The Legislature does not say that one fact shall be another; but the same result is accomplished by directing the Courts *to consider one* fact "*as if*" it were *another*.

To the poor victim of this harsh Legislative degree, passed undoubtedly without a full consideration of its unjust and unjustifiable consequences, the Courts are no longer open to have right and justice administered as the facts are, but he is denied a hearing;—or what amounts to the same thing, his case is treated "*as if*" it were something else. He is denied from having the facts upon which his case depends considered as they are, and he is thus deprived of "remedy by due course of law." In any other situation he, and every other person, including railroad companies, if injured

by the negligence of another, shall have the right as the truth is; but when a *railroad company* is the injuring party, in certain cases brought by a specified few, the truth shall no longer be considered truth.

Why is a party in this situation denied this common law right? Not because he is where the law prohibits him from being, nor because he is engaged in doing something he should not do, nor because it is not meritorious to do what he does, but simply because the Legislature has said so. The Legislative enactment does not imply that he shall do differently from what he has done heretofore; neither does it declare that such contracts are thereafter to be unlawful; but it says in effect this:—Do just as you have done heretofore, make exactly the same contracts and carry them out as made. If, however, the one party (the passenger on the railroad company) thereto is injured, the Courts are directed to consider the right of the injured party to have remedy therefor not as the facts of the contract and situation are but "*as if*" the contract and situation were entirely different.

Can an Act of the Legislature substitute a new contract in place of a lawful contract that has been broken, and declare that the rights of the parties shall be determined according to the substituted contract instead of according to the contract the parties themselves had made? Or, can the Legislature say that it is perfectly lawful and we will allow you to enter into such contracts, but we will

direct the Courts to consider such contracts not as they really are but *as if* they were different ones?

The plaintiff under the laws of the State of Pennsylvania was clearly a passenger. The Courts have in the same jurisdiction in the case of the plaintiff applied a different rule in measuring the plaintiff's rights than the rule used in measuring the rights of others of the same class.

The plaintiff was upon the cars of the defendants in pursuance of a lawful contract. A person can only enter and be upon the premises of a railroad company *without being a trespasser* by reason of a contract. If he enters in pursuance of a contract, he *must* do so either to perform some service for the railroad company for which they pay him a compensation, or a service is rendered *him* by them for which *he* pays them a compensation. He must go there either to render or accept a service. All cases naturally and necessarily fall into the one or the other category. In this case the plaintiff paid for a service rendered him; why, then, should he be treated and have his case considered and decided "*as if*" he belonged to the other class?

To say that one who pays for a service rendered him shall be considered in the same class as the one who is paid for rendering the service, is so manifestly absurd and unjust that the very statement of the proposition should be enough to condemn it.

The case of the plaintiff and any other passenger can not be distinguished. The rights of both rest upon contract. They both pay for the *same service* rendered i. e. their conveyance from one place to another. The mandate of the Legislature to the Courts can not take the case of one or a few cases of a class to which they belong and direct a special rule in the adjudication of their rights different from the rule applied to all others of the same class. This is a denial of "the equal protection of the laws" to those few.

Every citizen of the State of Pennsylvania has the right when he brings a person into court to answer for an injury sustained through his negligence to prove any fact which may be necessary to establish his right to have redress. In the case of the plaintiff this right is denied by the legislative mandate of this Act to consider the actual facts "*as if*" they were other and different facts. This is not "due process of law" and is denying to the plaintiff "the equal protection of the laws."

It seems that a Court of Justice has too high a regard for truth to ever consent to consider one thing "*as if*" it were another,—one fact as another.

Again the trial Court in the charge to the jury declared the plaintiff to be a servant of the defendants and a fellow servant of the train hands running the train on which he was carried when injured, yet there is *not a scintilla of evidence to show* that he was helping to run the train. He himself and all the train hands swore that he was

not so helping. *It is certainly not a fact.* He and the train hands had no common employer; nor were they engaged in a common employment. Those running a train are under the law fellow-servants; but the plaintiff was not helping to run the train at all.

How a person like the plaintiff, not helping to run the train and doing nothing while on it, not employed by the railroad company and not doing any work usually done by their employees, can be classed as a fellow-servant of the engineer who runs the train is beyond our comprehension. It may be asserted or declared that they are fellow servants but it can not be demonstrated by the stern rules of logic and of truth. The chasm is so wide that it can not be spanned even by the wildest flight of the imagination!

How then can the plaintiff be compelled to have his rights determined by the rule applicable to a case where such was the fact? In thus compelling him to have his rights determined according to the rule established for measuring the rights of a servant of a railroad company injured through their negligence and in compelling him to assume the relation of a servant of such railroad company, when in truth he was no servant of such railroad company, is such a violation of the fundamental principles of right and distributive justice upon which our government is founded as to excite the gravest apprehension, is such a variance from them as would not be tolerated were it not because it

affects but a very few and therefore escapes public attention. It seems to us that a Court must forget the essential and foundation principle, constituting the basis of all our laws, enunciated in the Declaration of Independence, that "All men are created equal" and shall stand on an equality before the law, when they give life and validity to such a monstrous perversion of all right and departure from the established rules of measuring out justice.

For a Court to say that by reason of this statute the plaintiff was on the train of the defendants as one of their servants and a fellow servant of the train hands, when in truth and in the absence of the Statute no such facts would have existed, is the making by the Legislature of facts that do not exist, and applying such facts in a case. Such facts are worse than perjured ones!

Can a Court whose daily duty is trying to find out what the truth is be author of and declare a deliberate falsehood? Perpetrate a fraud upon a suitor? Impossible!

The rule as settled by the Constitution and law of Pennsylvania is that disputed facts from oral testimony must be found by a jury, yet under the rulings upon this Act, and in this case, the Court determines the fact whether the plaintiff comes within the provisions of the Act or not. Finds whether the plaintiff is a passenger or a servant of the railroad company. This finding by the trial Court of the plaintiff as a servant of the

railroad company in the present case is in such flagrant disregard of the truth and all justice as to shock the moral sense of man. This Act, a piece of class legislation of the most iniquitous kind, has been extended by construction even far beyond the intent of the Legislature.

The Act was passed right after the decision of *Railroad Company vs. Meyers*, *supra*, and under fair rules of construction would not amount to more than the legislating of that decision into statute law; yet by construction it has been extended as to make the person subjected to its provisions hold his rights, life and liberty at the will of the trial judge.

In this respect, as the law is administered, it discriminates against the plaintiff and others in such situation as to the right of trial by jury.

By reason of the Act, the Courts not only find facts concerning which there is no evidence but they find facts directly contrary to the undisputed facts in the case. Yet under the laws of the State of Pennsylvania (as declared in *Ulrich vs. Arnold*, *120 Pa. 170*, page 182), "It is error to submit to a jury a question of which there is no evidence." As much so is it error for the Court itself to find a fact concerning which there is no evidence.

To state the proposition plainly, in the present case, a fact is suppressed and a fact which does not exist is declared to exist; and as a result a new contract is substituted for the contract the parties themselves had made. And this is done by a

Legislative mandate to the Courts directing that when a particular state of facts exists, to treat these facts "*as if*" they were something else. By this Act the judiciary are directed if fact "*A*" is proved to mete out justice "*as if*" fact "*B*" was the truth. Facts can be changed by the Courts through authority of the Pennsylvania Legislature. *One thing* is to be treated "*as if*" it were *another*.

Looking at it from the standpoint of fairness it is dishonest, looking at it from the standpoint of reason it is an absurdity.

Another direction in which it operates unequally is this, it relieves railroad companies from liability for their negligence, while not relieving any others from such liability; yet it has repeatedly been decided by the Supreme Court of Pennsylvania, that common carriers can not relieve themselves from negligence even by contract. That it was against the policy of the law for them to do so.

In *Penna. R. R. Co. vs. Henderson, 51 Pa. 3 5, page 331*, the release given read as follows, viz: "The person accepting this free ticket assumes all risks of accidents, and expressly agrees that the Company shall not be liable, under any circumstances, whether of negligence by its agents or otherwise, for any injury to the person, or for any loss or injury to the personal property of the party using it." The Court says:—"Our doctrine, settled upon grave deliberation, declares that such a release is no excuse for negligence."

In *Railroad Co. vs. O'Hara, 3 Pennypicker, 190*, the case of a person riding on a free pass upon a contract similar to one above quoted, the Court says:—

"A common carrier can not protect himself by special contract from liability for negligence. If the free pass was unlawful, the conductor should have demanded the regular fare, and his not doing so did not make the plaintiff a trespasser, or destroy her rights as a passenger."

If this case stands, the plaintiff is without redress, and the defendants are relieved from liability for negligence. The negligence was theirs, under the well known maxim, *qui facit per alium facit per se.* Others are not relieved from negligence in any case. The measure of justice denied the plaintiff would be exacted from him were the positions of the parties to this suit reversed. There would be no special legislative mandate directed to the Courts granting him immunity from liability (or partial immunity) were he defendant and the Cornwall Railroad Company the plaintiffs. As said in *Commonwealth vs. Zacharias, supra*, "The Act is not an attempt to regulate a business but an illegal attempt to legislate in favor of a class." The rule of equality is violated by the Act in this respect.

As was said in *United States vs. Cruikshank, 92 U. S. 555* (23-592):—"The equality of the rights of citizens is a principle of Republicanism. Every republican government is in duty bound to protect

all its citizens in the enjoyment of that principle, if possible." The amendment was added to the Constitution to uphold and enforce this grand foundation principle. We can not but feel that this principle is violated when one of two parties seeking redress for the same injury by the same remedy is deprived from a full hearing of the facts upon which his case depends by a legislative enactment that Courts shall treat those facts "*as if*" they were different ones, while the other shall have a full hearing and justice as the facts are.

In that the Act takes the case of the plaintiff out of the class (passengers) to which he belongs and makes his right to redress more burdensome (destroys it), it is denying him "The equal protection of the laws;" in that it deprives him of the privilege to prove the truth, it is not "Due process of law."

As authority in support of these propositions, we cite the following numerous list of cases:

DeChastellux vs. Fairchild, 15 Pa. 18, was the case where the Act of Assembly in question enacted that a new trial be granted and allowed by the Court of Common Pleas in a certain action therein instituted and carried to final judgment in the Supreme Court, and directed "That the said case be proceeded in to trial and judgment, with like effects in all respects *as if* the same had not been heretofore tried in said Court and passed upon on motion for a new trial."

Held unconstitutional, Chief Justice Gibson delivering the opinion.

In *Menges vs. Dentler, 33 Pa. 495*, the Act of Assembly declared that the Sheriff's deed for a tract of land lying partly in Lycoming County and partly in Northumberland County and sold by the Sheriff of Lycoming County, Pa., upon process issued out of the Common Pleas of said County "Should be good and valid to all intents and purposes, in the same manner and with the same effect, *as if* the whole of the said tract of land were situate in the County of Lycoming."

The Act was declared unconstitutional.

Baggs' Appeal, 43 Pa. 512, was a case where, when the decree of final distribution in the estate of John H. Baughman, administrator of Andrew Hendrickson, of Allegheny County, deceased, had been made over eleven years, an Act of Assembly was passed declaring "That it shall be the duty of the Orphans' Court of Allegheny County, on petition of any party in interest, to grant a review of the administration account, &c., with the same effect *as if* application had been made within five years next after such decree."

Held unconstitutional, Chief Justice Lowrie using this language:—

"There is nothing plainer (516) in the bill of rights than the principle that all men must stand on an equality before the judicial tribunals, and they do not stand so, if the judiciary is bound to

admit an inequality created by a legislative decree, by which a statute of limitation or any other element of the remedy is set aside or altered for any particular case or person, so as to affect the right. * * * Equality of administration is a large and essential element of justice. * * * That legislation can not be just that gives opposite rules for distinct cases in the same class, that excludes any case from the class to which it naturally belongs, that says to persons in general, you shall have the protection that naturally arises from lapse of time, and to some particular person you shall not have it. This is nothing like 'the due course of law.'"

Richards vs. Rote, 68 Pa. 249, is the case of another "*as if*" statute held unconstitutional.

These statutes quoted and held unconstitutional were identical with the present one in that they attempted to change existing facts by giving them the force of different facts. The 1st section of the XIVth Amendment would avoid every one of these statutes.

In *Ziegler vs. S. & N. Alabama R. Co. 58 Ala. 599*, it was held that an act fixing absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business, without negligence or wrong on its part, when under the general law of the land no one else was so liable under such circumstances, did not provide for "due process of law" and was void, the Court saying:—

"Due process of law implies the right of the

person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in its most comprehensive sense, to be heard, by testimony or otherwise, and to have the right of controverting by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law. * * * If this were so (everything in the form of an enactment to be law) acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void "

In *People Ex. Rel. Witherbee vs. Supervisors*, *70 N. Y. 228*, this language is used by the Court:—

"Due process of law requires, that a party shall be properly brought into court, and that he shall have an opportunity when there, to prove any fact which, according to the Constitution and the usages of the common law, would be a protection to him or his property."

As to what is "due process of law," Chief Justice Gibson, in *Norman vs. Heise*, *supra*, uses this language:—"What law? Undoubtedly a pre-

existent rule of conduct not an *expost facto* rescript or decree made for the occasion. The design of the convention was to exclude arbitrary power from every branch of the government; and there would be no exclusion of it if such rescripts or decrees were to take effect in the form of a statute."

Chief Justice Bronson in *Taylor vs. Porter, 4 Hill, 145 N. Y.*, says:—"The words 'law of the land,' as here used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense."

Comstock, Justice, in *Wynehamer vs. People, 13 N. Y. 378, page 392*, said:—"To say that 'the law of the land' or 'due process of law' may mean the very act of legislation which deprives the citizen of his rights, privileges or property, leads to a simple absurdity. The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or, at least, it can not be *created* by a legislative act which aims at their destruction. Where rights of property are admitted to exist, the Legislature cannot say they shall exist no longer. It is plain therefore, (*page 395*) both upon principle and authority, that these

constitutional safeguards, in all cases, require a judicial investigation, *not to be governed* by a law specially enacted to take away and destroy existing rights, but confined to the question whether, under the pre-existing rule of conduct, the right in controversy, has been lawfully acquired and lawfully possessed."

In *State vs. Staten, 6 Coldw. (Tenn.) 244*, it was held that an act of legislature conferring on the Governor the power to set aside and annul the registration of the voters of a county, in whole or in part, was unconstitutional, as depriving them of their rights "without due process of law."

In *Sears vs. Cottrell, 5 Mich. 254*, this language is used:—

"By 'the law of the land' we understand laws that are general in their operation, and that affect the rights of all alike; and not a special act of the legislature, passed to affect the rights of an individual against his will, and in a way in which the same rights of other persons are not affected by existing laws."

"The fourteenth amendment applies to all citizens of the United States, and is intended to protect them in their privileges and immunities as such, against the action as well of their own State as of other States in which they happen to be. The privileges and immunities do not consist merely in being placed on an equality with others, but embrace all the fundamental rights of a citizen

of the United States as such. One of these fundamental rights is the right to pursue any lawful employment in a lawful manner, or in other words, the right to choose one's own pursuit subject only to constitutional regulations and restrictions."

Live Stock Association vs. Crescent City Co., 1 Abb. (U. S.) 388. Cited also in Note 2, Am. & Eng. Encyclopædia of Law, Vol. 3, page 727.

The case of *Millett vs. People of Illinois, 5 Western Reporter, 155*, decides that "The General Assembly has no authority to select out one class of business, and deny to persons or corporations engaged therein the privilege to contract for labor and to sell their products without regard to weight; while at the same time it allows to persons engaged in all other classes of business those privileges; hence, a statute which imposes on the owner of a coal mine the obligation to make all his contracts for labor to be regulated by weight, and imposes upon him the duty to provide scales for this purpose, is unconstitutional." The Court in the opinion uses this language:—

"The words 'due process of law,' are held to be synonymous with the words, 'the law of the land,' (Cool. Const. Lim. 1st ed. 352, 353); and this means general public law binding upon all the members of the community under all circumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals. *Janes vs. Reynolds, 2 Tex. 251.* See

also *Wynehamer vs. People, 13 N. Y. 432; Vanzant vs. Waddel, 2 Yerg. 269.*

"'Every one,' says Cooley (Const. Lim. 1st ed. p. 391), 'has a right to demand that he be governed by general rules, and a special statue that singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but an arbitrary mandate, unrecognized in free government. Mr. Locke has said of those who make the laws:—'They are to govern by promulgated, established laws not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court, and the countryman at the plough,' and this may justly be said to have become a maxim in the law, by which may be tested the authority and binding force of legislative enactments.

"And again the same authority says (p 393):—'The doubt might also arise whether a regulation made for any class of citizens, entirely arbitrary in its character, and restricting their rights, privileges or legal capacities in a manner before unknown to the law, could be sustained. * * * Distinctions in these respects, should be based upon some reason which renders them important—like the want of capacity in infants and insane persons; and if the Legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build

such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the Act would transcend the due bounds of legislative power, even if it did not come in conflict with express constitutional provisions. The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness.'

"See also *Budd vs. State*, 3 Humph. 483, where the section of the Act incorporating the Union Bank, which provided that if any of the officers, agents or servants of that bank should embezzle the funds of the bank, or make false entries, they should be guilty of felony, was held unconstitutional, because it did not apply generally to officers, agents or servants of banks committing like offenses. And *Wally vs. Kennedy*, 2 Yerg. 554, where an Act authorizing the Court to dismiss Indian Reservation cases, where prosecuted for the use of another, was held unconstitutional. In the last case the Court said: 'The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic or land under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void.

Were it otherwise, odious individuals or corporate bodies would be governed by one law, the mass of the community and those who made the law by another; whereas, a like general law affecting the whole community equally could not have been passed.' On like principle is also *People vs. Marx*, 99 N. Y. 377.

"What is there in the condition or situation of the laborer in the mine to disqualify him from contracting in regard to the price of his labor or in regard to the mode of ascertaining the price? And why should the owner of the mine, or the agent in control of the mine, not be allowed to contract in respect to matters as to which all other property owners and agents may contract?

"Undoubtedly, if these sections fall within the police power, they may be maintained on that ground; but it is quite obvious that they do not. These requirements have no tendency to insure the personal safety of the miner or to protect his property or the property of others. They do not meet Dwarris' definition of police regulations. They do not have reference to the comfort, the safety or the welfare of society. Dwar. Stat. Potter's ed. 458.

"We do not think that the General Assembly has power to deny to persons in one kind of business, the privilege to contract for labor and to sell their products without regard to weight, while at the same time allowing to persons in all other kinds of business this privilege; there being noth-

ing in the business itself to distinguish it in this respect from any other kind of business. * * * We do not think he (owner of mine) can be compelled to make all his contracts in these respects to be regulated by weight."

We would also invite the attention of the Court to the case of *County of Santa Clara vs. Southern Pacific R. R. Co., 118 U. S. 394*, (30-118, page 122), showing how the point there raised was decided in the Circuit Court, although this Court sustained its decision on other grounds.

The case of *The Chicago, Milwaukee & St. Paul R. R. Co. vs. The State of Minnesota, ex. rel., 134 U. S. 418* (33-970) is also in point to show that the Act under consideration is not due process of law in that it denies the plaintiff the opportunity to prove a fact.

The principles enunciated in the opinion in *Yick Wo vs. Hopkins, 118 U. S. 356* (30-220), we commend to the attention of the Court.

Taking into consideration the arbitrary, unjust and unequal manner in which the rights of the plaintiff were measured by the trial judge, the language there used might well be applied here:

"The facts establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the law as adopted, it is applied by the public authorities charged with their administration, and thus repre-

senting the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the plaintiff, as to all other persons, by the broad and benign provision of the XIVth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance (not the case here) yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this Court in Henderson vs. Mayer, etc."

The arbitrary manner in which the rights of the plaintiff were denied him by the trial Court, the denial to him of the opportunity to prove the truth and have it considered as proved, the absurdity of the Act in that it implies that one fact may be considered as if it were another fact, the ridiculous absurdity of it in that it is an assumption by the Legislature that they can create facts and direct the Courts to interject those facts that do not exist into the trial of a case in the Courts, the false ground that it is a police regulation upon which the Supreme Court of Pennsylvania affirms its constitutionality, the heavier burdens it imposes upon the plaintiff in seeking redress than upon

others of the same class, *and because the plaintiff, if this Act is constitutional*, IS DENIED ALL REDRESS *for an injury suffered*, are the grounds upon which we confidently appeal to this Honorable Court to declare that the first section of the Act of April 4, 1868, is not "Due process of law" and a denial to the plaintiff by the State of Pennsylvania within its jurisdiction of "The equal protection of the laws," and therefore is unconstitutional and avoided by the first section of the XIVth Amendment to the Constitution of the United States.

A. FRANK SELTZER,
B. MORRIS STROUSE,
Attorneys for Plaintiff in Error.

No. 18.

No. 18. October Term, 1897.

Filed Oct. 12, 1897.

IN THE

Supreme Court of the United States.

Lewis Miller, Plaintiff in Error,

vs.

The Cornwall Railroad Company, Defendant in Error.

In Error to the Supreme Court of the State of Pennsylvania.

BRIEF OF ARGUMENT OF DEFENDANT IN ERROR.

WAYNE MacVEAGH,
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Counsel for Defendant in Error.

Allen, Lane & Scott, Prs., Phila.

In the Supreme Court of the United States.

Lewis Miller, Plaintiff in Error,	
vs.	October Term, 1897.
The Cornwall Railroad Company, Defendant in Error.	No. 18.

In Error to the Supreme Court of the State of Pennsylvania.

BRIEF OF ARGUMENT OF DEFENDANT IN ERROR.

This record presents for the consideration and decision of this court two distinct questions, and only those two questions. Does the Act of the Legislature of Pennsylvania of April 4th, 1868, contravene the Constitution of the United States? And this question is divided by the counsel for the plaintiff in error into two: Does it contravene the Constitution of the United States by refusing to the persons falling within its provisions the equal protection of the laws; and if not, does it deny to such persons due process of law?

The language of the Act is as follows:—

"When any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, or premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be only such as would exist if such person were an employee: *Provided*, That this section shall not apply to passengers."

It is not seriously contended by the counsel for the plaintiff in error that their client does not distinctly and unequivocally come within both the spirit and the words of this legislation; but if such contention had been seriously advanced it would

be overwhelmingly disproved by the facts established at the trial and contained in the evidence. That evidence established that near the city of Lebanon, in Pennsylvania, there are iron furnaces, from which extends the railroad of the defendant in error to the Cornwall ore banks, whence ore is obtained and shipped over said railroad to said furnaces. The proprietors of the furnaces had been for more than twenty years obtaining ore for their furnaces from these ore banks by way of the railroad of the defendant in error under an agreement requiring them to furnish their own cars and a man to take charge of them. The plaintiff in error was employed by the owners of the furnaces, in pursuance of this agreement, to take charge of the cars they supplied for the carriage of the ore from the ore banks to the furnaces. His duties were, as the evidence clearly establishes, to take charge of the cars at the furnaces, to oil and repair them as they needed it, to go with them from the furnaces to and over the railroad of the defendant in error, and see that they got to the ore banks where they were to be loaded with ore; and his duties then continued in the same degree upon their return journey, when thus loaded, to the furnaces.

On page 22 of the transcript of record, the plaintiff in error testified as follows:—

Q. You say you have been twenty-four years railroading?

A. Yes, sir.

Q. Where were you railroading these twenty-four years?

A. I was railroading some twenty years over the Cornwall road and awhile on the Philadelphia and Reading.

Q. By whom were you employed during these twenty years; you were employed over the Cornwall railroad, by whom?

A. By Coleman.

Q. Doing what?

A. Tending to the cars, taking them over to the Cornwall road, and having them sent out to Cornwall for ore; they were running the ore cars.

Q. You were running the ore cars of Coleman & Brock at the furnaces, weren't you?

A. No; the cars ran me after I was on the Cornwall road.

Q. You ran the cars off down into the yard?

A. I was there to run them on the Cornwall branch and they had to take them to the iron hill.

Q. Didn't you carry them right down over the Cornwall Railroad?

A. I ran them down to whatever the train was that was lying there to receive them; I ran them in the yard to whatever train was ready to receive my cars.

Q. You ran them from North Lebanon furnaces, from the Cornwall Railroad down over the Valley branch into the yard on the Cornwall Railroad?

A. Yes; into the yard, up to the train.

Q. So they were attached to the regular train and carried to Cornwall, weren't they?

A. Yes; attached to the train there.

Q. Run onto the anthracite siding, weren't they?

A. That was different—sometimes on that one and sometimes on the other; I couldn't testify to that.

Q. You accompanied the cars, didn't you?

A. The cars more accompanied me; I was sitting on them.

Q. As a matter of fact you sat in the cars and rode from Lebanon to Cornwall, didn't you?

A. Sometimes I rode down——

Q. You were sent really in your own cars?

A. Sometimes I rode on mine and sometimes on somebody else's.

Q. As a rule you occupied your own cars, didn't you?

A. Most times I did; I preferred my own.

Q. And broke on those cars?

A. I had no need braking.

Q. As a matter of fact, didn't you brake on those cars?

A. I had no need to brake.

Q. Question repeated.

A. Sometimes I did.

Q. When the engineer called for brakes, didn't you join with the other brakemen and brake?

A. That was how I felt; I had no need of doing it; I did it sometimes.

Q. When the cars got out of repair who reported them to the firm—to the North Lebanon Furnace Company?

A. I was the man to repair them when they got out of repair; I put them in repair when I could.

Q. Whenever any accident occurred, you were the man to repair them, weren't you?

A. Yes, when any accident occurred on the road to them, sometimes, what I could do I did.

Q. Your duty was to go with your empty cars and see to the loading of the ore, was it not?

A. My duty was to go along with the cars and see that they got to the ore company.

Q. And when anything got out of repair your duty was to repair it, if you could?

A. It might, what I could; but my duty—I didn't repair nothing along the line; what was broke along the line I hadn't anything to do with repairing.

Q. If anything got out of fix, was it your duty to put it in fix?

A. When it was a little thing that I could do, I did it. It was not my duty to see along the Cornwall Road. I couldn't make any repairs with the hand; I had no tools. I pushed packing in the boxes; I did that, or put a little oil in sometimes. Such repairs I did; it was my duty.

Q. And that duty you performed where you could on the road, and where you couldn't do it there you did it at home?

A. Yes; I done it sometimes along the road.

On page 31 of the transcript of record, Elmer Bluntz, a witness called for the plaintiff in error, testified as follows:—

Q. You were in the accident—you were hurt?

A. Yes, sir.

Q. What was Lewis Miller doing on that train?

A. Well, tending to his cars, as far as I know.

Q. Tending to what cars?

A. The North Lebanon ore cars.

Q. Tending to the cars?

A. Yes.

Q. What was he doing on that railroad; what was his position on the railroad?

COLONEL SELTZER:—That is, if you know; if you don't know, say you don't know.

A. I seen him repairing the cars; seen him fixing the cars if anything was wrong with them.

Q. Did you see him bring the cars down from the North Lebanon Furnaces?

A. Yes, sir.

Q. Did you see him braking?

A. I did see him braking a little bit.

It will be seen from this testimony how clearly and explicitly the plaintiff in error was, on the morning of October 16th, 1890, occupying precisely the position described in the Act of Assembly of April 4th, 1868. He sustained personal injury while lawfully engaged or employed on or about the road of the railroad company, and in or about a train or car thereon, of which railroad company he was not an employee. In other words, twenty-two years after this Act of Assembly was enacted, the plaintiff in error voluntarily placed himself exactly in the position described by it. It is now claimed that he is not to be treated as having done so, because the Commonwealth of Pennsylvania was not entitled to declare that any person thereafter voluntarily assuming such a position must, in the interest of the general welfare, be held to occupy the same position as if he were in the employ of the railroad company itself. It is not open to assertion that this statute conflicts with any of the generous and comprehensive provisions of the Bill of Rights in the Constitution of Pennsylvania. That question was distinctly raised and distinctly decided by the Supreme Court of the State in the case of Kirby *vs.* Pennsylvania Railroad Company, 76 Penn. Rep., 507. In making that decision the court says:—

"The relation he," that is, the plaintiff in error in this case, "assumes is one of danger, and the fact of danger authorizes the regulation by the State, as the conservator of the lives, security, and property of its citizens. The Act is a police regulation which, having respect for the general good, forbids individuals from undertaking a dangerous employment except at their own risk, to the same extent as if they were in the immediate employment of the railroad company."

In other words, the legislature believed it was for the public interest that whoever was lawfully engaged upon a railroad

train must be held to the same measure of responsibility for the negligence of any other person lawfully engaged upon the same train as if he was technically employed by the railroad company itself.

In Pennsylvania especially the custom long prevailed, even upon its main railroads, of shippers furnishing their own cars and persons to ride upon and attend to them, which cars formed part of a train moved by the railroad company from one point to another. The Act in question was passed simply to destroy the technical distinction that the person in charge of such cars was not an employee of the railroad company, while its own employees, in charge of other cars upon the same train, were such employees, and that the measure of responsibility for diligence, foresight, and care imposed upon the employee of the railroad company ought, in the public interest, to be imposed to exactly the same extent, and no more, upon the employee of the private shipper who was in attendance upon the cars of such shipper. It is not easy to see how the practical wisdom and propriety of such an enactment can be successfully assailed, for whoever does not care to be subject to its terms need not assume the position it describes; but even if this court should be of opinion that the legislation in question was unwise, which is not apprehended for a moment, it remains equally difficult to see how the discretion upon the subject lodged in the Legislature of Pennsylvania can be transferred to this tribunal. It may be admitted that the Fourteenth Amendment to the Constitution of the United States was not only advisable, but in many respects necessary to complete the system of government under which we live, and to secure to the citizens of each State the same general measure of rights and liberties as are accorded to the citizens of any other State; but that such a statute as is now in question either denies to the persons who see fit to place themselves within its terms either the equal protection of the laws or due process of law, it is not easy to discover. The learned and exhaustive argument of counsel for the plaintiff in error presents, it may be frankly admitted, every possible point of view in support of their contention, and they have cited every decision which they be-

lieved themselves able to represent as favorable to them; but there is no decision of this court or of any other court, so far as can be ascertained, which gives the slightest countenance to the proposition they present with such labor and acumen.

They quote the language of this court in United States *vs.* Cruikshank, 92 U. S., 555, as supporting their view: "The equality of the rights of citizens is a principle of republicanism; every republican government is in duty bound to protect all its citizens in the enjoyment of that liberty, if possible." Now the Act in question simply abolishes a technical distinction between the plaintiff in error riding upon, attending to, and braking some of the cars in the train, with another person standing upon, attending to, and braking other cars in the same train; so that, so far from contravening, it distinctly supports the doctrine of the equality of the rights of citizens.

They also quote the language of the Supreme Court of Pennsylvania in Bagg's Appeal, 43 Penn. Rep., 512. "There is nothing plainer in the Bill of Rights than the principle that all men must stand on an equality before the judicial tribunal, and they do not stand so if the judiciary is bound to admit an inequality accorded by a legislative decree by which a statute of limitation or any other element of the remedy is set aside or altered for any particular case or person so as to affect the right. * * * Equality of administration is a large and essential element of justice. * * * That legislation cannot be passed that gives opposite rules for distinct cases in the same class; that excludes any case from the class to which it naturally belongs, and says to persons in general you shall have the protection that naturally arises from the lapse of time, and to some particular person he shall not have it; this is nothing like the due course of law." Now the object of the statute assailed by the counsel for the plaintiff in error was not to create but to remedy such an equality as is criticised in this decision. No reason whatever can be offered why of two persons lawfully engaged in the movement of the same train upon the same railroad a certain measure of responsibility or of privilege shall be imposed upon or accorded to the one and a wholly different measure be accorded to

or imposed upon the other, and the object of the Act of Assembly in question was simply to secure equality as between two persons occupying in all essential respects precisely the same position. The counsel for the plaintiff in error, in support of their contention that the Act of April 8th, 1868, violates that provision of the Fourteenth Amendment which prohibits any legislature from withholding from any citizen due process of law, quotes the language of the Supreme Court of Alabama in Ziegler *vs.* S. & N. Alabama Railroad Company, 58 Ala. Rep., 599. "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense, to be heard by testimony or otherwise, and to have the right of controverting or proving every material fact which bears on the question of right in the matter involved."

And they have also quoted the language of the Supreme Court of Pennsylvania in Norman *vs.* Heise, 5 Watts & Sergeant, 171. As to what is due process of law, Chief Justice Gibbon uses this language: "What law? Undoubtedly a pre-existent rule of conduct, not an *ex post facto* rescript or decree made for the occasion." Now the Act of Assembly assailed in this case has no resemblance whatever to the evils against which these decisions are aimed. On the contrary, it meets every requirement of the definition of a pre-existent rule of conduct, general in its operation, and designed to remove an inequality of a wholly technical nature, the continuance of which in the body of the law was calculated to increase the danger to all persons engaged in the common employment as well as to others liable to be affected by their negligence.

It is therefore confidently submitted that it is not open either to the allegation that it contravenes any provisions of the Federal Constitution or any principle of general justice and equity.

HOWARD C. SHIRK,
WAYNE MacVEAGH,
Counsel for the Defendant in Error.

MILLER *v.* CORNWALL RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 18. Argued October 18, 1897. — Decided November 1, 1897.

The validity of a statute is drawn in question whenever the power to enact it, as it is by its terms, or is made to read by construction, is fairly open to denial, and is denied.

Under Rev. Stat. § 709, if the ground on which the jurisdiction of this court is invoked to review a judgment of a state court is, that the validity of a state law was drawn in question as in conflict with the Constitution of the United States, and the decision of the state court is in favor of its validity, this must appear on the face of the record before the decision below can be reëxamined here.

A suggestion of such appearance, made on application for reargument, after the judgment of the trial court is affirmed by the Supreme Court of the State, comes too late.

This court has no jurisdiction on a writ of error to a state court to declare a state law void on account of its collision with the state constitution.

An objection in the trial of an action in a state court that an act of the State was "unconstitutional and void," when construed in those courts as raising the question whether the state legislature had power, under the state constitution, to pass the act, and not as having reference to any repugnance to the Constitution of the United States, is properly construed.

The report of this case in the Supreme Court of Pennsylvania shows that it assumed that it was dealing, under the assignments of error, only with the state constitution.

Lewis Miller brought his action against the Cornwall Railroad Company in the Court of Common Pleas of Lebanon County, Pennsylvania, to recover damages for personal injuries sustained through the company's negligence while he was

being carried on one of its trains. At the trial, the case was left to the jury, but the court reserved "the question as to whether there is any evidence of the defendant's negligence to go to the jury." A verdict was returned in plaintiff's favor, notwithstanding which, judgment was entered for defendant on the point reserved. The decision turned on the conclusion that Miller was to be treated as if he was, at the time of the accident, an employé of defendant because, though not in fact such employé, he came within the terms of the first section of an act of the General Assembly of Pennsylvania, approved April 4, 1868, Laws Penn. 1868, p. 58, No. 26, § 1, which reads as follows:

"SECTION 1. That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employé, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employé: *Provided*, That this section shall not apply to passengers."

The court was asked by plaintiff to instruct the jury, among other points, as follows: "1. Lewis Miller, the plaintiff, was a passenger on the train when he received his injury." "2. The act of April 4, 1868, is unconstitutional and void." "3. The right of the plaintiff to have remedy for his injury was a well known and clearly defined common law right, one of the inherent indefeasible rights guaranteed to all citizens by the Constitution. The act of April 4, 1868, can therefore not be invoked by the defendant against the plaintiff. And it is not remedy by the due course of law." But the court refused to do so. The case was taken by appeal to the Supreme Court of Pennsylvania and the first, second and third errors assigned were to the refusals to give the foregoing points, in their order. The words "inherent indefeasible rights" and "remedy by the due course of law" were placed in quotation in point three, as given in the third assignment. The judgment was affirmed by the Supreme Court, on February 27, 1893,

at the January term of that year. 154 Penn. St. 473. On January 8, 1894, appellant Miller filed a motion for reargument on these grounds:

"1. Because of material errors of fact into which the court fell, in the consideration of the case, and which, we believe, led to the affirmance of the judgment of the court below.

"2. Because the plaintiff desires to present the case for review on the point raised, by the second assignment of error, as to the constitutionality of the act of April 4, 1868, under the XIV Amendment to the Constitution of the United States. The question was not orally argued for want of time and the judgment is not in shape for such a review.

"3. General reargument."

A reargument was refused, and this writ of error then sued out.

Mr. Benjamin Morris Strouse and *Mr. A. Frank Seltzer* for plaintiff in error.

Mr. Wayne McVeagh for defendant in error. *Mr. Howard C. Shirk* was on his brief.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

The contention of plaintiff in error is that the first section of the act of April 4, 1868, is invalid because in contravention of the Fourteenth Amendment, in that it deprives him of due process of law and denies him the equal protection of the laws.

The validity of a statute is drawn in question whenever the power to enact it, as it is by its terms, or is made to read by construction, is fairly open to denial, and is denied. *Baltimore & Potomac Railroad* v. *Hopkins*, 130 U. S. 210, 224. And under section 709 of the Revised Statutes, if the ground on which the jurisdiction of this court is invoked is that the validity of a state law was drawn in question as in conflict with the Constitution of the United States, and the decision of the state court was in favor of its validity, this must appear

on the face of the record, before the decision below can be re-examined here. *Dibble* v. *Bellingham Bay Land Co.*, 163 U. S. 63, 70.

The record in this case discloses no attempt to question the validity of the particular statute, in the state courts, as in contravention of the Federal Constitution, unless in the points requested to be given in the trial court and the refusal to give them, for even if it could be held that such question was raised on the application for reargument, nearly a year after the judgment of the Common Pleas was affirmed by the Supreme Court, the suggestion came too late. *Texas & Pacific Railway* v. *Southern Pacific Company*, 137 U. S. 48; *Loeber* v. *Schroeder*, 149 U. S. 580; *Pim* v. *St. Louis*, 165 U. S. 273.

We have no jurisdiction on a writ of error to a state court to declare a state law void on account of its collision with a state constitution, and it was long ago held that where it was objected in the state courts that an act of the State was "unconstitutional and void," the objection was properly construed in those courts as raising the question whether the state legislature had the power under the state constitution to pass the act, and not as having reference to any repugnance to the Constitution of the United States. *Porter* v. *Foley*, 24 How. 415.

By the constitution of Pennsylvania, it has always been declared that all men "have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness"; and also "that all courts shall be open, and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by the due course of law, and right and justice administered without sale, denial or delay." Const. Penn. 1790, Art. IX, §§ 1, 11; Const. Penn. 1838, Art. IX, §§ 1, 11; Const. Penn. 1873, Art. I, §§ 1, 11.

The presumption as to point two is that it referred to the state constitution, and this was made certain by point three, which quotes from that instrument.

From the report of this case in 154 Penn. St. 473, it is appar-

ent that the state Supreme Court assumed that it was dealing under the assignments of error only with the state constitution, as was also the fact in *Kirby* v. *Pennsylvania Railroad*, 76 Penn. St. 506, where the question of the constitutionality of the first section of the act in question was directly passed upon, and the section sustained.

We agree with counsel in the statement, made on the application for reargument, in respect of a review of this judgment by this court because thereby the state Supreme Court had decided in favor of the validity of the act when drawn in question as repugnant to the Constitution of the United States, that "the judgment is not in shape for such a review."

Writ of error dismissed.